United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

For the
District of Columbia Circuit
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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,682

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE,
a Corporation

Appellant,

v.

THOMAS PATRICK HEALY,
an infant, by and through
his father and next friend,
James D. Healy, and
JAMES D. HEALY

Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in granting plaintiffs' motion for late filing of security for costs in derrogation of the Court Order dated the 8th day of September 1954, Title II, Section 1506, of the D. C. Code, Rule 6(b) and 60(b), of the Federal Rules of Civil Procedure, and without affording the defendants an opportunity to be heard?

2. Did the Court err in refusing to grant defendants motion to dismiss on grounds that the plaintiff had failed to comply with the order of the Court?

3. Did the Court err in refusing to grant defendant's motion for a directed verdict at the close of plaintiff's opening statement and at the close of plaintiff's case?

4. Did the Court err in refusing to charge the jury on the question of speculation as to the proximate cause?

5. Did the Court err in permitting the plaintiff to exhibit an infant and his scars after plaintiff rested and during cross-examination of defendant's witness, without any proof of identification?

6. Did the Court err in permitting an excluded witness to remain in the court room during the trial, and later permitting that witness to take the stand and refute testimony heard in open court?

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction upon appeal to review the judgment in the lower court by virtue of Title 28, U.S.C. Section 1291.

STATEMENT OF THE CASE

On the 15th day of June 1951, one Mrs. James D. Healy with three of her children went to the Dental Clinic at Georgetown University where the oldest child, James, had an appointment for some dental work (J.A. 31, 32). The four of them went to the first floor of the

building where James had his examination and some work done after which they went to the second floor of the building where James was to have an extraction in the oral surgery department (J. A. 32). James was taken into oral surgery and Mrs. Healy with her daughter Betty Ann, age 11, (J. A. 46) and Thomas Patrick, age 3-1/2, were sent into the waiting room which was across the corridor from oral surgery (J. A. 32, 33). There came a time when Mrs. Healy together with her two children went out of the waiting room, down the corridor and into the ladies rest room (J. A. 32, 33).

The door from the corridor opens into a foyer from which there are two doors one leading into the rest room and the other leading into a locker room. The door straight ahead led to the rest room and the door on the left led into the locker room which was adjacent to the rest room (J. A. 43). The locker room was for the use of female medical students at the Georgetown University Hospital (J. A. 88).

When Mrs. Healy emerged from the rest room with her two children, they had "just rounded the corner and Tommy wasn't there" (J. A. 44). He had not been gone "more than a minute" when Mrs. Healy and Betty Ann turned to get him (J. A 44), "but before we arrived for Tommy the crash occurred" (J. A. 44). "We went right back around the corner into the room. The entrance to the room was blocked by lockers" and "Tommy was under it" (J. A. 45).

There were three steel lockers to a single unit, and there were three units of lockers in this room (J. A. 66). These lockers had been in that room for the past three years and there had never before been an accident with these lockers (J. A. 89). The lockers are 6 feet 6 inches tall and weigh about 125 pounds (J. A. 94). The plaintiff maintained that the holes in the legs were for bolting the lockers to the floor. However the defendant maintained that the lockers were not made to be bolted to the floor or to the wall (J. A. 93-96).

Suit was filed by the plaintiffs alleging in the first count that the defendants had "negligently created" and "negligently maintained" an "attractive nuisance", and in the second count "negligently created" and "negligently maintained" a "hidden danger" (J. A. 1-3). These allegations were generally denied by the defendants (J. A. 4, 5).

The plaintiff is a non-resident of the District of Columbia and upon motion duly made the Court ordered the plaintiff to file security for costs "on or before 18 September 1954" (J. A. 5). The cause came on for trial on 8 May 1956 when it was discovered that the plaintiff had not complied with the order of the court. The trial court granted the plaintiffs time to seek authority from the pre-trial judge to file a motion for leave for late filing of security for costs and the trial court gave the defendants time to file a motion to dismiss.

On the following day, 10 May 1956, out of the presence of the attorney for the defendant, the plaintiffs presented a motion for late filing and the pretrial judge, Judge McLaughlin, at that time signed an order granting leave to file security for costs (J. A. 7). Without knowledge of this action on the part of the defendants, on 14 May 1956 the defendant timely filed opposition to the plaintiffs' motion and by leave of the same pre-trial judge defendant filed a motion to dismiss (J. A. 9, 10). Both of these motions were subsequently assigned for hearing before the motions court on 23 May 1956. On this date, for the first time, the defendant was advised of the action of the pre-trial court on May 10th and was given a copy of the order, and was also advised that the security for costs had now been filed. Upon being so advised the motions court, Judge Kirkland, thereupon referred the two pending motions back to the pre-trial judge, granting the defendant an opportunity to file a motion to vacate the order of May 10th (J. A. 13). The following day on 24 May 1956 the same pre-trial judge permitted the defendant to file a motion to vacate the order of May 10 (J. A. 11). Thereafter, the same pre-trial judge denied defendant's motion to vacate but deferred further consideration

of the two motions which were assigned to the motions court on 23 May 1956 for decision by the trial court. The pretrial judge thereafter became the trial judge in this case and as such overruled defendant's motion to dismiss and refused to take further action on plaintiffs' motion (J. A. 24-31).

At the commencement of the trial all witnesses who were not parties in the cause were excluded from the court room (J. A. 14). After the opening statement by the plaintiff it was noted that Mrs. Healy, not a party, was seated in the court room (J. A. 22, 23). Upon calling this to the attention of the court, Mrs. Healy departed for the witness room (J. A. 23). Thereafter when Mrs. Healy was called as a witness she volunteered to correct statements made by the attorney for the plaintiff in his opening statement while she was in the court room (J. A. 44). After Mrs. Healy had completed her testimony she again remained in the court room and advised with counsel for the plaintiff. This fact was noted in the record (J. A. 72). Over objections (J. A. 102, 103), Mrs. Healy was recalled as a rebuttal witness and permitted to testify with reference to testimony she had heard in open court (J. A. 106, 107).

During the cross-examination of a witness for the defendant, over objection, and without any prior identification, the plaintiff exhibited a child whom he referred to as Tommy and showed the jury the back of his head (J. A. 72, 73). At the conclusion of the court's charge to the jury, the court refused to include a charge relating to speculation as to the proximate cause (J. A. 114).

The jury returned a verdict in favor of the infant plaintiff, Thomas Patrick Healy, in the amount of $12,500.00 and in favor of the father, James D. Healy, in the amount of $2,500.00.

STATEMENT OF POINTS

The Court below erred as follows:

1. In granting plaintiffs' motion for late filing of security for costs in derrogation of the Court Order dated the 8th day of September 1954, Title II, Section 1506, of the D. C. Code, Rule 6(b) and 60(b), of the Federal Rules of Civil Procedure, and without affording the defendants an opportunity to be heard.

2. In refusing to grant defendants motion to dismiss on grounds that the plaintiff had failed to comply with the order of the Court.

3. In refusing to grant defendant's motion for a directed verdict at the close of plaintiff's opening statement and at the close of plaintiff's case.

4. In refusing to charge the jury on the question of speculation as to the proximate cause.

5. In permitting the plaintiff to exhibit an infant and his scars after plaintiff rested and during cross-examination of defendant's witness, without any proof of identification.

6. In permitting an excluded witness to remain in the court room during the trial, and later permitting that witness to take the stand and refute testimony heard in open court.

STATUTES INVOLVED

Title II, Section 1506 of the D. C. Code, Rule 6(b) and 60(b) of the Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

By order of the lower court, the plaintiffs were required to file security for costs on or before the 18th day of September 1954. The case came on for trial on the 8th day of May 1956 at which time the plaintiffs had not complied with the order of the court. The trial court granted the plaintiff time to seek approval from the pre-trial court to filing a motion for authority for late compliance with the order and gave the defendant an opportunity to seek approval for the filing of a motion to dismiss on grounds that the plaintiff had not complied with the order of the court.

Without hearing, without consideration of the defendant's points and authorities in opposition, and without the knowledge of the defendant, the pre-trial judge signed an order permitting the late filing of the security for costs. On the 23rd of May 1956 the defendant's motion to dismiss and the plaintiffs motion to file security for costs was referred to the Motions Court for hearing. At that time the defendant learned for the first time that the pre-trial judge had permitted the filing of the security for costs, and that the security for costs was filed. It was not until that time that the defendant was even tendered a copy of that order. Thereupon the Motions Court referred the pending motions for hearing and consideration of the pre-trial court and gave the defendant an opportunity to file a motion to vacate the previous order by the pre-trial court. This motion was filed and the matter subsequently came on for hearing before the pre-trial court. The same pre-trial judge over-ruled defendant's motion to vacate and the other pending motions were deferred for consideration and determination by the trial court. The trial court turned out to be the same pre-trial judge who had taken the prior actions. At the opening of the trial the motion to dismiss was over-ruled and the court refused further action on the plaintiff's pending motion. Although the security for costs had been filed the motion as referred to the motions court on May 23rd remains undetermined.

The District of Columbia Code provides that failure to comply with an order of the court the case shall stand dismissed. The Federal Rules of Civil Procedure give the court discretion in the matter for a period of one year after non-compliance with the order of the court. The non-compliance in this case extended over a period of one year and eight (8) months and the court did not therefor have discretion in the matter.

The plaintiff's case was predicated on attractive nuisance and hidden danger. At no time in the opening statement or in the testimony contained in plaintiff's case in chief did they show anything other than the simple fact that an accident occurred. The record is completely void of any evidence as to how the accident happened, what caused the accident to happen and the complete lack of any evidence of negligence on the part of the defendant. Likewise there was no showing that anything was an attractive nuisance or that there was a hidden danger known to the defendants. Everything except the fact that an accident happened was left entirely to the imagination and mere speculation as to how it might have happened and why it happened. There was not room for even conjecture as to what might have attracted the child into the room and what the hidden danger was supposed to be.

After the plaintiff rested and during the cross-examination of a defendant witness, over objection, the plaintiff for the first time exhibited a child, and a scar on the back of his head. At no time during this trial was this child identified as one of the plaintiffs or otherwise. As a matter of fact on cross-examination of the defendant's witness, that witness denied that the child was the infant plaintiff involved in this litigation.

During the course of the trial witnesses were duly excluded except one, the mother of the child. She was not a party to the litigation yet she was permitted to remain in the court room, later to take the stand on rebuttal and voluntarily take issue with testimony she had heard from other witnesses, all to the prejudice of the defendant.

ARGUMENT

I. The Court erred in granting plaintiff's motion for late filing of security for costs in derrogation of the court order dated 8 September 1954, Title 11 Section 1506 of the D. C. Code, Rules 6(b) and 60(b) of F. R. C. P. and without affording the defendant an opportunity to be heard.

Unless the established rules of the procedure are strictly adhered to by the parties in litigation confusion is bound to result. This fact is certainly made evidence by the manifest confusion of the trial judge (J. A. 25-31) when for the third time the question of defendant's motion to dismiss and the plaintiff's motion to permit late compliance with a court order came up for consideration. At no time during this period were the motions disposed of in accordance with Rule 9 of the rules of this court. To date there has been no hearing on plaintiff's motion for authority to file the security for costs in derrogation of the court order even though this motion had been properly referred to the Motions Court but the Motions Court referred it back to the pre-trial judge since that court prematurely signed an order authorizing the filing of the security for costs, and the pre-trial judge deferred it again to the trial judge.

When this case came on for trial before Judge Matthews on the 9th day of May 1956, it was learned for the first time that the plaintiff had not complied with the order of the court which required the filing of security for costs "on or before the 18th day of September 1954". Under ordinary circumstances the trial court would resolve the problem by oral motion to extend the time in which to file the security for costs and the resulting confusion might then have been avoided. However, Judge Matthews considered Rule 6(b) of the Federal Rules of Civil Procedure which would purport to give the court some discretion in compliance with the orders of the court and also Rule 60(b) which

limited that discretion to a term of no more than one year of non-compliance. Judge Matthews thereupon continued the trial and permitted the plaintiff to seek authority from the pre-trial judge to file a motion for authority to comply to the court order late, and to permit the defendant to seek authority from the pre-trial judge to file a motion to dismiss.

On the following day, 10 May 1956, the plaintiff presented his motion to the pre-trial judge not in the presence of the defendant and instead of permitting the motion to be filed as was intended, the pre-trial judge signed an order authorizing the plaintiff to file the security for costs and at the same time the plaintiff did file the motion. The defendant was not advised of this action, by counsel or otherwise, and in the regular course of procedure on the 14th day of May 1956 the defendant duly filed opposition to plaintiff's motion and at the same time filed a motion to dismiss. The plaintiff duly filed an opposition to the defendant's motion never once mentioning even in opposition, or otherwise advising the defendant that the court had already signed an order on May 10th permitting the late filing of the security for costs and that the security for costs had now actually been filed. It was not until May 23rd when the two motions were properly before the Motions Court that it was announced that the pre-trial judge had signed such an order on May 10th in advance of this scheduled hearing and that the plaintiff had now filed the security for costs.

The Motions Court thereupon referred the two pending motions back to the pre-trial judge giving the defendant an opportunity fo file a motion to vacate the order of May 10th since it was signed prior to the hearing and out of the presence of the defendant. The motion to vacate was duly filed and subsequently overruled by the pre-trial judge. At that same time the pre-trial judge deferred the motion to dismiss for consideration of the trial judge and since there had been no hearing on the plaintiff's motion it must also have been necessarily deferred to the consideration of the trial judge. As it happened, the pretrial judge who signed the

order of May 10th, permitted the filing of the defendant's motions and who subsequently referred the matters for disposition by the trial judge actually became the trial judge. After a lapse of five (5) months the case was in precisely the same position as it was when orginally assigned to Judge Matthews for trial except that security for costs had been deposited.

The rules of procedure are intended to avoid just such an experience as we have had in this case. The defendant was entitled to a hearing on plaintiff's motion and the order of May 10th was strictly irregular and erroneously entered by the court to the prejudice of the defendant. It is urged by the defendant that since Rule 60(b) limits the discretion of the court to a period of one year that should be binding upon the court technical as it may seem. Had there been a proper hearing on defendant's motion to dismiss as well as the plaintiff's motion the precise issue might have been made more clear to the court.

The pleadings of the plaintiff refer only to excusable neglect yet the trial court made its ruling on the theory of "an appealable order". At no time in the pleadings was the question of finality of the order brought up by the plaintiff. Yet it appears to the defendant that even so it is not the crux of the problem here.

The defendant urges that this highly irregular procedure in the lower court not only on the part of the court but equally on the part of counsel created a situation whereby the defendant was deprived of a fair and impartial trial, and it must not be condoned by this Court.

II. The Court erred in refusing to grant defendant's motion to dismiss on grounds that the plaintiff had failed to comply with the order of the court.

Title 11, Section 1506 of the D. C. Code, 1951 edition, provides that as pertains to the filing of security for costs by non-residents

"In case of non-compliance * * * within a time to be fixed by the court, judgment of non-suit or dismissal shall be entered." (Emphasis Supplied).

Rule 6(b) of the Federal Rules of Civil Procedure provides that "The Court for cause shown may at any time in its discretion * * * (2) upon motion duly made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under rules * * * (60(b)) except to the extent and under the condition stated therein."

Rule 60(b) of the Federal Rules and Civil Procedure provides that "On motion and upon such terms as are just, the court may relieve the party or his legal representatives from a final judgment, order or proceeding for the following reasons:

1. Mistake, inadvertence, surprise or excusable neglect;* * *
2. The motion shall be made within a reasonable time, and for reasons (1) * * * not more than one year after the judgment, order or proceeding was entered or taken." (Emphasis Supplied).

In this case the court ordered the plaintiff to file security for costs "on or before 18 September 1954". One year and eight months after that date the plaintiff had not complied with the order. No action was taken by the plaintiff to seek an extension of time or to amend the original order. The plaintiff did, however, file a motion for authority to comply late on grounds of excusable neglect.

It is the contention of the defendant that the statute involved is clear, the rules are unequivocal and the order of the court requiring the security to be filed before a day certain was clear. Had the plaintiff moved for an extension of time within the one year limitation, the defendant would concede that the court might have some discretion but here we have no such action on the part of the plaintiff and the statute says the case shall be dismissed. It seems quite clear that under such circumstances the court is without discretion to extend the limitations of the statute.

The rules of this court are not intended to extend the limitations of the statute and it is urged that there has been a misconception on the part of the court and the plaintiff as to the powers of the court in this situation. Had a motion been filed to extend the time in which to comply with the court order, within the one year limitation, it is conceded that the court would have some discretion. However, that is not the type of action which was taken by the plaintiff and the court ruled that despite the fact that there was no compliance within the time fixed by the court the plaintiff shall now have the privilege of complying one year and eight months late. In the case of Carpenter vs. Carpenter, 156 Fed. 2d, 857, this court held that the lower court was justified in dismissing a case where there was a lapse of four months from the time of filing defendant's motion for security for costs and the final denial of plaintiff's motion to reconsider the order dismissing the cause. The date for filing the security for costs having been passed and no extension of time having been requested the court granted the motion to dismiss.

The rule is clear that under 6(b) the court may exercise its discretion in acting upon its own orders but in that specific rule the discretion is limited by Rule 60(b) which states that such action must be made within a reasonable time and in any event "not more than one year". It would, therefore, seem quite unreasonable that the gate should be left open indefinitely and that if there were any other interpretations of this rule, the rule itself is rendered useless. Here we have a non-compliance for a year and eight months and it is respectfully submitted that pursuant to Title 11, Section 1506 of the D. C. Code this cause should have been dismissed by the lower court.

III. The Court erred in refusing to grant defendants motion for a directed verdict at the close of plaintiff's opening statement and at the close of plaintiff's case.

In the plaintiff's opening statement it was said that after Mrs. Healy emerged from the rest room and got back up into the hall or waiting room

when she discovered that Tommy was not with her (J. A. 16) she sent Betty Ann back to get him. She returned saying that Tommy was in the locker room. Mrs. Healy then immediately went back to get Tommy and simultaneously she heard a loud crash and thud. As she entered the room she found Tommy lying face down under the lockers (J. A. 16, 17). That constitutes plaintiff's sole description as to how this accident occurred and the sole basis for the claim against the appellant. Other words were uttered describing the room and the lockers, in addition, to the injuries sustained but nothing more was said or relied upon in order to hold the appellants guilty of negligence or liable under the theory of att ractive nuisance.

The only witness who testified as to what actually happened was Mrs. Healy. Her testimony was somewhat in contrandiction to the opening statement but still basically the same and certainly not more revealing. She testified that as she emerged from the rest room with her two children, and had "rounded the corner" she discovered that Tommy was no longer with her. She turned to get him but before she arrived the crash occurred (J. A. 44, 45). There was not another word about how this accident happened. An allusion was made to the effect that the lockers should have been bolted to the wall but there has not been one word of testimony anywhere in the record as to what caused the lockers to fall. There was testimony, uncontradicted, that the lockers had been in that room for the past three years and that never before had there been an accident involving these lockers.

The claim of the plaintiffs is based upon the doctrine of attractive nuisance. It is their contention that the lockers attracted the child into a place where he was not supposed to be and, as a result of the negligence of the appellant, the child was injured. The appellant submits that there is not one scintilla of evidence to back up such a claim. When the evidence is boiled down, the most we can find is that an accident happened. The mere fact that an accident happened does not make

the owner of property liable, and the mere fact that one event follows another in time does not establish a casual relationship between them (Bussmann Manufacturing Co. vs. N. L. R. B. 111 Fed. 2d 783).

As a general rule no duty exists toward an infant trespasser except to refrain from willfully or wantonly injuring them (Roland vs. Byrd, 195 S.E. 458). Trespassing children occupy the same position as trespassing adults except for the special liability imposed upon the owner of property under the attractive nuisance theory. The rule is that the owner is only liable for negligence after discovering the trespasser's peril (Jones vs. Louisville, Nashville R. R. Co., 297 Ky. 197, 179 S. W. 2d 874, 152 A. L. R. 1259) United Zinc Co. vs. Britt, 258 U.S. 271. It is essential to liability under this theory that the attractive thing or something inseparably connected with it must have been the proximate cause of the injury (Swartwood vs. Louisville and Nashville R. R. Co., 111 S. W. 305, 45 L. R. A. (NS) 652) and it is essential that the presence of the child be due to the attraction (Salt River Valley Water Users Assn. vs. Compton, 111 Pacific 2d 839). Nowhere in this record is there evidence of what the attractive thing is or even might have been, say nothing of the complete lack of proof as to what, if anything, attracted the child into that particular room.

In order for the plaintiff to recover under the theory of attractive nuisance it is encumbent upon him to prove (1) knowledge on the part of the property owner of the alluring or inherent dangerous quality of the object in question; (2) a legal duty owed to the plaintiff and a breach of that legal duty; (3) the reason for the presence of the child in the place where the injury occurred; (4) the nature and kind of attraction; and (5) the proximate cause of the injury (see American Jurisprudence Neg. Sec. 145, Hardy vs. Missouri Pacific R. R. Co., 266 Fed 860, 36 A. L. R. 1; Fitzmaurice vs. Connecticut R. R. Co., 62 A. 620; Nashville Lumber Co. vs. Busbee, 139 S. W. 301, Hunschi vs. Southern Pac. Co., 62 Fed Sup 634, Wilmer vs. Chicago N. W. R. R. Co., 156 N. W. 877). The record in this case is completely void of these

essential elements of proof and the appellees are challenged to show where in this record it is shown what it was that attracted the child into the room, what caused the lockers to fall, what knowledge, if any, was had by the owner as to what hidden danger, if any, and what negligence there is on the part of the owner. The whole claim is based entirely upon speculation as to what was the proximate cause of the injury. Proof of a bare possibility that a happening may be due to a given cause does not justify a finding that it was so caused (Russell vs. Boston & Maine R. R. Co., 141 A. 227, 283 N. H. 246). Likewise, in the case of Swartwood's Guardian et al vs. Louisville & Nashville R. R. Co., 111 S. W. 305, the child was attracted on the property by a sand pile but he was injured while jumping on cars and the court held that the reason for coming on the property, the attractive nuisance, was not the proximate cause of the injury and, therefore, plaintiff was not entitled to recover. In this case we don't even have evidence to show what caused the child to go into the room in the first place and in the second place there is no evidence to show what caused the locker to fall. Except for the mere happening of the accident everything else is left to the imagination and speculation.

Further, the record is completely void of any proof that the lockers as such are dangerous per se and peculiarly alluring and attractive to children. As a matter of fact, from a reading of the record, it is impossible to know just what it is that the appellee is maintaining as an attractive nuisance and just what it is that the plaintiff is maintaining as cause for the lockers to fall. In the case of Branan vs. Wimsatt, 54 App. D. C. 374 it was held by this court that the attractive nuisance doctrine is not applicable to property not dangerous per se or particularly alluring or attractive to children. The appellees not having met this test are not entitled to a recovery under the doctrine of attractive nuisance. It is interesting to note that this case also holds that the "duty devolves on natural guardian and lawful custodian to protect

children from consequences of their restless spirit of adventure and that duty cannot be wholly transferred to strangers". It is clear from the plaintiff's case that it is the intent of the parents of this child to transfer the responsibility to the property owner. This they are attempting to do by simply showing that an accident occurred. The approval of such claim would seriously effect all property owners and certainly is not justified under the law or in good conscience.

Should we assume that all elements of proof have been met by the appellee the sole legal question would then be whether or not the locker as such can be construed to be an attractive nuisance with such hidden danger as to constitute liability upon the owner of the property. The attention of the court is respectfully referred to the case of Manos vs. Meyers-Miller Furniture Co., 120 S.E. 357 where, except for the lack of information on what caused the lockers to fall, we can speculate that the facts in this case are somewhat similar. In that case an infant was diverted from an alleyway into an adjacent room where there were some shelves maintained by the occupant of the building. It was shown that these shelves were six feet tall and it was clear that the shelves were defective in that they were wider at the top than they were at the bottom and, therefore, easily subject to fall. The child climbed upon these shelves and they did fall over and the child was killed. In that case the court held that the shelves were not inherently dangerous nor could they be called alluring, and unless the defendant could have reasonably anticipated that trespassers would be attracted to them so as to enter upon its premises and afterwards to climb upon the shelves in such a way to cause them to pitch forward, it could not be held liable. The homicide appears to have been an unforeseen accident and the plaintiff was denied recovery. In the present case, it is hardly likely that the court could consider a locker any more attractive to a youngster than open shelves but, be that it may, in this case we have not one scintilla of evidence that the child even climbed upon the locker nor is there any

other evidence whatsoever that would show or tend to show what caused the lockers to fall. Except for the fact that an accident happened everything else is left to the imagination, speculation and conjecture. We submit that on the basis of the evidence outlined in the plaintiffs' opening statement and produced in the plaintiff's case in chief, it is insufficient in law and in fact to permit a recovery against the appellant.

IV. The Court erred in refusing to charge the jury on the question of speculation as to the proximate cause.

After delivering the charge to the jury and during the discussion of the adequacy of this charge the appellant urged the court to charge the jury that they must not speculate as to the proximate cause of this injury. This the court refused to do (J. A. 114). It is respectfully submitted that a verdict and finding must be based on evidence and cannot rest on conjecture, speculation or mere possibilities. The verdict and finding must be supported by legal and substantial evidence and cannot be based on evidence which is inherently incredible or non-existent. It is a well established rule that the verdict cannot rest on surmise or speculation (32 C. J. S. 1116).

The evidence on which the verdict and finding are based must be competent, legal evidence, and must support every material fact. Where there is no evidence or where the evidence as to a material issue is insufficient, the decision should be against the party having the burden of proof. The evidence must be sufficient to warrant a reasonable belief in the existence of those facts which the verdict or finding establishes. The verdict or finding must be based on reasonable certainty and not on mere possibility. A scintilla of evidence is not sufficient (U.S. vs. Krumsiek, 111 Fed 2d 74). Testimony consisting of mere legal conclusion is insufficient and a verdict or finding cannot be based on evidence which is non-existent.

The triers of the facts may not speculate as to the cause of a happening, such as an injury (Thomasen vs. Montgomery Ward & Co,, 33 Fed. Supp. 81). Proof of a bare possibility that happening may be due to a given cause does not justify a finding that it was so caused (Russell vs. Boston & M, 141 A. 227, 283 N.H. 246).

With the status of the record as it was submitted to the jury by the court over objection by the appellant, it is eminently clear that the jury could only arrive at a verdict by speculation. This prejudiced the substantial rights of the appellant and it is an error sufficient to warrant a reversal of the finding and a dismissal of the cause.

V. The Court erred in permitting the plaintiff to exhibit an infant and his scars after plaintiff rested and during cross-examination of defendant's witness without any proof of identification.

During the course of this trial the infant plaintiff did not take the stand and at no time was identified to the jury as the infant who suffered injuries as contained in the cause of the action. It was not until the plaintiff cross examined a defendant's witness that the infant was brought into the court room and exhibited to the jury and referred to as "Tommy". Over objection the court permitted this exhibition even though the witness himself testified that that child was not Tommy.

It is elementary that such procedure is contrary to the rules of evidence. The attorney for the plaintiff acknowledged that the procedure was irregular and offered to reopen plaintiffs' case, but the plaintiff had rested and it was clear that such procedure was not only outside the scope of the direct examination but it permitted the plaintiff to reopen his case during cross-examination, and worst of all it left the whole case in serious doubt as to whether or not this child actually was Tommy, the plaintiff. Yet at no time did the plaintiff correct this situation by definitely proving that this child, who was so exhibited to the jury, was actually Tommy and that the scar which was pointed out

on the back of the head was an injury caused by the falling of the lockers.

It is respectfully submitted that such action as permitted by the lower court prejudiced the jury against the defendant and in favor of the plaintiff thereby perhaps giving impetus to an erroneous finding by the jury. Certainly the rights of the defendant were serious impaired.

VI. The Court erred in permitting an excluded witness to remain in the court room during the trial and later permitting that witness to take the stand and refute testimony heard in open court.

The primary purpose of excluding witnesses from the court room during the trial in which the witness intends to testify is to insure unbiased testimony from that witness in no way affected by testimony of other witnesses produced in open court. It is the intent of a trial to produce the true facts as they may be established by witnesses giving oral testimony. This is the one way that a jury may feel secure in the feeling that the testimony from the witness is his own testimony and not that of any other witness who may have knowledge of the facts and circumstance. By excluding the witnesses during the trial the jury may be assured that the witness is testifying independently of any other witness. With such precaution the parties are protected from testimony which may be varied or biased in terms tending to correlate the witnesses' testimony with other test imony that may have been heard by the witness in open court. If, as in this case, the witness is permitted to hear testimony it is only natural that his testimony will be biased or strained in an effort to corroborate or contradict testimony that was heard.

In this case we have a very clear example of the effect of violating the rules requiring the exclusion of witnesses and where one witness heard the testimony of another and then took the stand to explain. In

this case we have Mrs. Healy, the mother, not a party to this case but a most important witness, being permitted to remain in the court room during the opening statements and during the proceedings that followed her testimony. Later she was permitted to take the stand and refute such testimony. It should be very clear that had Mrs. Healy been excluded during the testimony of Dr. Burke she would not have been in a position to take issue with his testimony in the manner that she did. The question would have been entirely different and you would have a situation where the jury would have to determine whether the doctor was right or whether she was right without this voluntary explanation of the circumstances. The jury was deprived of one of their responsibilities by this procedure and it is clear that the defendant was seriously prejudiced by this procedure. If the defendant were permitted to have had Dr. Burke in the court room when Dr. Murphy was testifying we would not have had that problem of trying to convey one opinion for the consideration of the doctor and thereby obtain his opinion based upon the same facts. In other words, if Dr. Burke could have heard the testimony of Dr. Murphy his testimony would be much more to the point and obviously much more persuasive to the jury. So it was when Mrs. Healy was permitted to hear testimony in open court and then be permitted to take the stand to explain it away. The substantial rights of the defendant were adversely affected by this procedure and the court in justice to this defendant should remand this cause to the District Court with instructions that it be dismissed.

CONCLUSION

For the reasons hereinbefore set forth it is respectfully submitted that the action taken by the lower court should be reversed and the proceedings dismissed.

Respectfully submitted,

DANIEL J. ANDERSEN
639 Woodward Building
Washington 5, D.C.

Attorney for Appellant

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JOINT APPENDIX

[Filed June 12, 1954]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

493 THOMAS PATRICK HEALY, an infant, by and through his father and next friend, James D. Healy, 4419 Montgomery Avenue, Bethesda, Maryland,

and

JAMES D. HEALY, 4419 Montgomery Avenue, Bethesda, Maryland,

Plaintiffs

vs.

Civil Action No. 2535-54

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, a corporation, 37th and O Streets, Northwest, Washington, D.C.,

Defendant.

COMPLAINT FOR PERSONAL INJURIES SUSTAINED BY AN INFANT ON PRIVATE PROPERTY

First Count

1. Jurisdiction is founded on Section 11-306 of the District of Columbia Code, 1951 Edition.

2. On or about June 15, 1951, and for a long time prior thereto, the defendant was possessed of certain real estate located at 3900 Reservoir Road, Northwest, in the District of Columbia. The defendant on said date and for a long time prior thereto conducted a Dental Clinic

on said premises for both infants and adults.

3. The infant plaintiff on or about June 15, 1951, was taken to the said clinic by his mother, along with several other children of the Healy family and while there, his mother took the infant plaintiff, who at that time was three years of age, to the rest room on the second floor of said premises and upon leaving said rest room, the infant plaintiff entered an adjacent room, the door of which was open and the walls of which were lined with steel lockers; the infant plaintiff at-
494 tempted to open the door of one of the said lockers, none of which were bolted or secured in any manner to the floor or wall, the defendant having negligently placed and maintained them in that dangerous condition, and as a result three of the said lockers, being fastened together, fell over and on top of the infant plaintiff and crushed his head.

4. Prior to June 15, 1951, the defendant negligently created on said premises a so-called attractive nuisance; that is to say, a dangerous condition thereon, consisting of the condition described in paragraph 3 of this complaint, that was open, unguarded, and attractive to children, including the infant plaintiff, and on or about said June 15, 1951, the defendant negligently maintained, and/or negligently permitted to be maintained, the said attractive nuisance on a part of said premises, and as a result thereof the infant plaintiff was attracted thereto and injured in the manner and as alleged in paragraph 3 of this complaint.

5. As a result, the infant plaintiff Thomas Patrick Healy suffered and sustained serious, painful and permanent injuries; he suffered and sustained a cerebral concussion; he suffered and sustained head injuries; he suffered and sustained lacerations of the scalp; his sense of balance has been adversely affected; he has suffered, still suffers and in the future will continue to suffer great pain of body and mind; he has undergone, still is undergoing and in the future will continue to undergo medical examinations and treatments, and he has been otherwise injured and damaged.

6. As a result, the plaintiff, James D. Healy, has lost and in the future will continue to lose the services of the infant plaintiff and has
495 lost valuable time from his own work in caring for his said son's injuries in his home and in taking his said son to and from the doctor's office, as a result of which he has lost income which he would otherwise have earned and received, and has incurred, still is incurring and in the future will continue to incur expenses for medical examinations, x-rays, treatments, transportation to and from the doctor's office, and for a maid and other services in and about his home, and he has been and in the future will be otherwise damaged.

WHEREFORE, the plaintiff, Thomas Patrick Healy, an infant, by and through his father and next friend, James D. Healy, demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000) and costs, and the plaintiff James D. Healy demands judgment against the defendant in the sum of Five Thousand Dollars($5,000) and costs.

Second Count

1. The plaintiffs hereby adopt and by reference incorporate herein the allegations of paragraphs one to six, both inclusive, of the First Count of this complaint.

2. That prior to June 15, 1951, the defendant negligently created on said premises a hidden danger; that is to say a dangerous condition which reasonably careful people would not have discovered, which condition is set out fully in paragraph three of the First Count of this complaint, and on or about the said June 15, 1951, the defendant negligently maintained and/or negligently permitted to be maintained, the said hidden dangerous condition on said premises.

WHEREFORE, the plaintiff, Thomas Patrick Healy, an infant, by and through his father and next friend, James D. Healy, demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000) and costs, and the plaintiff, James D. Healy, demands judgment against the defendant in the sum of Five Thousand Dollars ($5,000)

496 and costs.

/s/ Arthur J. Hilland

/s/ Vincent C Burke, Jr.

Attorneys for Plaintiffs
902 Shoreham Building
Washington 5, D. C.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury.

/s/ Arthur J. Hilland

/s/ Vincent C. Burke, Jr.

Attorneys for Plaintiff

[Filed June 25, 1954]

497 ANSWER

Comes now the defendant President and Directors of Georgetown College, by and through counsel and in answer to the Complaint filed herein states as follows:

First Defense

1. The complaint fails to state a cause of action upon which relief may be granted to the plaintiffs.

Second Defense

2. The defendant admits paragraphs 1 and 2 of this first count of the complaint.

3. The defendant denies each and every allegation contained in paragraphs 3, 4, 5, and 6 of the first count of the complaint.

4. The defendant denies each and every allegation contained in paragraphs 2 of the second count of the complaint.

Third Defense

5. The injuries, if any, sustained by the plaintiffs were caused by the sole or contributory negligence of the plaintiffs.

Fourth Defense

6. The injuries, if any, were caused by the failure of the parents of the child, in keeping control of said child and permitting him to go into places, in their presence, where he should not have been permitted to go.

498 WHEREFORE THE PREMISES CONSIDERED, defendant prays that the complaint be dismissed with costs to the defendant.

MAGEE, BULOW AND ANDERSEN

BY /s/ Daniel J. Andersen

Attorney for defendant
745 Shoreham Building
ME. 8-0017

(CERTIFICATE OF SERVICE)

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* * * * * *

[Filed Sep. 8, 1954]

500 ORDER

The motion of the defendants for security for costs having come on for hearing in open court, and it appearing that the plaintiff is a non-resident of the District of Columbia, it is by the Court this 8th day of September 1954

ORDERED, that the aforesaid motion be and the same is hereby granted. The plaintiff will deposit with the Clerk of this Court One hundred fifty dollars cash or bond in the amount of Two hundred and fifty dollars as security for costs, on or before the 18th day of September 1954.

/s/ H. A. Schweinhaut

JUDGE

[Filed May 10, 1956]

506 MOTION FOR LEAVE TO FILE SECURITY FOR COSTS

The plaintiffs respectfully request the Court to grant them leave to file security for costs at this time, and as grounds therefor state as follows:

1. That on or about June 24, 1954, the defendants herein filed a motion for security for costs, and that, pursuant to the consent of the then co-counsel for plaintiffs, Vincent C. Burke, Jr., an order was signed on September 8, 1954, by Judge Henry A. Schweinhaut, requiring the plaintiffs to deposit with the Clerk of this Court One Hundred Fifty Dollars ($150) cash or bond in the amount of Two Hundred Fifty Dollars ($250), as security for costs, on or before the 18th day of September, 1954.

2. That at the time of the entry of the above-mentioned order, the then co-counsel, Vincent C. Burke, Jr., was distracted from his work and from this case by reason of illness in his family, and the related personal problems arising therefrom; and that through inadvertance and excusable neglect, failed to inform the plaintiffs of the said order, and the plaintiffs did not learn of the order until May 8, 1956, when they appeared for the trial.

3. That thereafter, on or about December 15, 1954, the said Vincent C. Burke, Jr., left the general practice of law, to assume other duties and responsibilities; and that thereafter, the failure to comply with the order of September 8, 1954, was not discovered by counsel for plaintiffs until May 8, 1956, when this case was set for trial, and counsel for defendants raised the question before Judge Burnita Shelton Matthews in chambers, immediately prior to the beginning of the trial.

507 4. That defendants have not raised this question during any time during the proceedings prior to the trial of this case, and particularly, that defendants did not raise this question at the pretrial of the case, when the said question would have been in order.

5. That the defendants are not prejudiced by the failure to comply

with this order, in that the plaintiff, James D. Healy, and the surety, Travelers Indemnity Company, have executed an undertaking for security of costs in the amount of Two Hundred Fifty Dollars ($250) on the 8th day of May, 1956, and the said undertaking is ready for filing.

6. That one of the plaintiffs in this case, Thomas Patrick Healy, is an infant,of tender years, whose interests cannot and should not be prejudiced by any technicality which does not work any hardship or place any burden upon the defendants.

7. That it is within the discretion of this Court to permit the filing of security for costs in this case at this time, although the time named in the order of September 8, 1954, has passed, since this failure was the result of excusable neglect.

8. The raising of this point at this time by the defendants is a frivolous and time-wasting procedure which does not affect the merits of this case.

Respectfully submitted,

/s/ Arthur J. Hilland
/s/ Thomas N. Kindness
Attorneys for Plaintiffs

* * * * * *

[Filed May 10, 1956]

508 **ORDER GRANTING LEAVE FOR LATE FILING OF SECURITY FOR COSTS**

Upon the motion of plaintiffs for leave to file security for costs at this time, and thereupon, by consideration thereof, it is, by the Court, this 10th day of May, 1956,

ORDERED, that the Clerk of this Court let the undertaking for security for costs of the plaintiffs be filed herein, and that this case be reset for trial.

/s/ Charles F. McLaughlin
JUDGE

[Filed May 14, 1956]

509

OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECURITY FOR COSTS

Comes now the defendant by and through counsel and in opposition to plaintiffs' motion for leave to file security for costs, states as follows:

1. By order of this court dated the 8th day of September 1954, the plaintiffs were ordered to deposit with the Clerk of this court, security for costs "on or before the 18th day of September 1954."

2. As of the date set for trial, 8 May 1956, the plaintiffs had failed to comply with the order of this court.

3. Title 11, Section 1506, of the D. C. Code provides as follows:

> "In case of non-compliance with the foregoing requirements, within a time to be fixed by the court, Judgment of nonsuit or dismissal shall be entered".

4. Plaintiffs' motion for leave to file security for costs one year and eight months after date fixed by the court, fails to establish "excusable neglect", and the affidavit of Vincent C. Burke, Jr., former associate of present counsel, does not excuse present counsel. The record of this case reveals that on 3 March 1955, present counsel was present and actively represented plaintiff in a deposition ordered by the defendants. The record also reveals the fact that present counsel personally handled the pretrial of this case on 15 February 1956. It is likewise clear that present counsel was first to sign the original complaint on 24 June 1954 and prepared for trial scheduled for 8 May 1956.

5. Rule 6(b) of the Federal Rules of Civil Procedure, cited by plaintiffs, provides as follows:

510

> "the court for cause shown may at any time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules * * * 60(b) except to the extent and under the conditions

stated in them".

6. Rule 60(b) of the Federal Rules of Civil Procedure, provides as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representatives from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *. The motion shall be made within a reasonable time, and for reasons (1) * * * not more than one year after the judgment, order or proceeding was entered or taken".

Plaintiffs' motion for leave to file Security for Costs, does not come within the limit of one year.

7. The plaintiffs' 8th point in the motion to the effect that defendants' position is "frivolous and time-wasting" is so ridiculous, it is hardly worthy of comment. It is nevertheless quite inconsiderate of present counsel to attempt to shift responsibility to a former associate, especially when present counsel had ample opportunity, and should have known what was required of the plaintiffs under the circumstances.

WHEREFORE, THE PREMISES CONSIDERED, defendants pray that plaintiffs' motion be denied.

/s/ Daniel J. Andersen
Attorney for defendants

(CERTIFICATE OF SERVICE)

[Filed May 14, 1956]

511 MOTION TO DISMISS

Comes now the defendant, by and through counsel, and moves this honorable court to dismiss the above cause of action and for reason therefore states as follows:

1. On 8 September 1954, the plaintiffs were ordered by this court to deposit "with the Clerk of this court $150.00 cash or bond in the amount of $250.00, as security for costs, on or before the 18th day of

September 1954".

2. As of the date set for trial, 8 May 1956, the plaintiffs had failed to comply with the order of this court.

3. By virtue of title 11, Section 1506, of the D.C. Code "judgment of nonsuit or dismissal shall be entered".

Respectfully submitted,

/s/ Daniel J. Andersen
Attorney for defendants

(CERTIFICATE OF SERVICE)

[Filed May 21, 1956]

512 POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In opposition to defendants' motion to dismiss the above-mentioned cause of action, the plaintiffs state as follows:

1. The defendants' motion to dismiss is addressed to the discretion of the Court.

2. That it is within the discretion of the Court to allow plaintiffs to file security for costs, even though the time named in the order has passed, under Rule 6(b) of the Federal Rules of Civil Procedure, which provides as follows:

> "....the court for cause shown and may at any time in its discretion....(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules....60 (b) except to the extent and under the conditions stated in them."

3. The rights of the infant plaintiff involved here cannot and should not be prejudiced by a technicality which does not work any hardship or place any burden upon defendants.

4. The facts and circumstances involved in this part of the proceeding are set forth in full in plaintiffs' motion for leave to file security for costs, filed herein May 10, 1956, and the affidavit attached thereto.

5. The defendants have not raised this question at any stage of the proceedings in this case, including the pretrial of the case, and they have not been prejudiced, nor have they had any unfair burden placed upon them as a result of the failure of the plaintiffs to comply with the order of September 8, 1954, by reason of excusable neglect.

513 WHEREFORE, the premises considered, the plaintiffs respectfully request the Court to deny the plaintiffs' motion to dismiss.

/s/ Arthur J. Hilland
/s/ Thomas N. Kindness
Attorneys for Plaintiffs

(CERTIFICATE OF SERVICE)

[Filed May 24, 1956]

514 **MOTION TO VACATE ORDER GRANTING LEAVE FOR LATE FILING OF SECURITY FOR COSTS DATED 10 MAY 1956**

Comes now the defendants by and through counsel and move this Honorable Court to Vacate the Order Granting Leave for Late Filing of Security for Costs dated the 10th day of May 1956 and for reason therefor refers to the affidavit of counsel for the defendant attached hereto and made a part hereof and for further reason that there has been no hearing upon the motion for leave to file security for costs filed by the plaintiffs on the 10th day of May 1956.

Respectfully submitted,

/s/ Daniel J. Andersen
Attorney for defendants

(CERTIFICATE OF SERVICE)

[Filed May 29, 1956]

515 **POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE ORDER GRANTING LEAVE FOR LATE FILING OF SECURITY FOR COSTS DATED MAY 10, 1956**

In opposition to the motion of defendants to vacate an order granting leave for late filing of security for costs dated May 10, 1956, the plaintiffs

state as follows:

1. That plaintiffs rely upon the affidavit attached hereto and the points stated therein.

2. The plaintiffs rely upon the notice of hearing included in plaintiffs' motion for leave to file security for costs, filed herein May 10, 1956.

3. Plaintiffs rely upon the order granting leave for late filing of security for costs entered herein May 10, 1956.

/s/ Arthur J. Hilland

/s/ Thomas N. Kindness
Attorney for Plaintiffs

(CERTIFICATE OF SERVICE)

[Filed June 15, 1956]

516 ORDER DENYING DEFENDANTS' MOTION TO VACATE ORDER

This cause came on to be heard by the Court upon the motion of the defendants to vacate an order granting leave for late filing of security for costs dated May 10, 1956, and thereupon, upon consideration thereof, it is, by the Court, this 15th day of June, 1956,

ORDERED, that the motion of defendants to vacate the order granting leave for late filing of security for costs dated May 10, 1956, be and the same hereby is denied.

/s/ Charles F. McLaughlin
JUDGE

Seen:

DANIEL J. ANDERSEN
Attorney for Defendants

I object to the form since it was my understanding that the court intended to vacate the order but leave the determination of plaintiff's right to file and the motion to dismiss to the trial Judge.

/s/ Daniel J. Andersen

[Filed June 15, 1956]

517 ORDER

This cause came on to be heard by the Court upon the motion of defendants to dismiss, and thereupon, upon consideration thereof, it is, by the Court, this 15th day of June, 1956,

ORDERED, that the motion of defendants to dismiss the complaint be, and the same hereby is denied, without prejudice to the right of defendants to restate the same motion as a preliminary matter for final determination by the trial court when this cause is called for trial.

/s/ Charles F. McLaughlin
JUDGE

Seen:
/s/ Daniel J. Andersen
Attorney for Defendants

[Filed Nov. 13, 1956]

530 NOTICE OF APPEAL

Notice is hereby given this day of November 1956 that the defendant, President and Directors of Georgetown College, a body corporate hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of October 1956 in favor of the plaintiff, Thomas P. Healy, $12,500 and James D. Healy, $2500 against said defendant.

/s/ Daniel J. Andersen
Attorney for Defendant

(CERTIFICATE OF SERVICE)

[Filed Jan. 16, 1957]

2 Washington, D. C.,
Wednesday, October 10, 1956

* * * * * *

BEFORE:

HONORABLE CHARLES F. McLAUGHLIN, Judge of the United States District Court for the District of Columbia . . .

* * * * * *

3 The following proceedings and transactions were then had and evidence was adduced:

PROCEEDINGS, TRANSACTIONS AND EVIDENCE

(The jury having been examined on its voir dire, selected, empanelled and sworn, the following occurred:)

THE DEPUTY CLERK: All witnesses who are not parties to the action in the case of Healy vs. President and Directors of Georgetown College please step forward and follow the Marshal.

THE COURT: Counsel may proceed.

Opening Statement On Behalf Of The Plaintiffs

By: Arthur J. Hilland, Esquire

MR. HILLAND: May it please your Honor and ladies and gentlemen of the jury: The principal plaintiff in this case is Thomas Patrick Healy, the little boy whom you have seen and who was only three and a half years old when he sustained the injuries for which damages are claimed in this case.

The evidence is going to show that he was born November 19th, 1947, so that when this occurred he was just a little bit more than three years and six months old and a little bit less than three years and seven
4 months. He then lived and still lives at 4419 Montgomery Avenue, Bethesda, Maryland, with his father and mother and sisters and brothers, of whom there are a number.

Because he is a child his case was filed by and through his father, James D. Healy, as his next friend as you have heard Mr. Burke, the Clerk, read it to you. And in addition to this boy as the plaintiff, there

is a claim by his father, James D. Healy, for the damages and expenses his father suffered and sustained as a result of the injuries suffered and sustained by the son.

The defendant although it may be referred to variously as the Georgetown Hospital Clinic or Georgetown Dental Clinic, rather, Georgetown Hospital and Georgetown University, the legal name of all of those is "President and Directors of Georgetown College, a corporation" which operates Georgetown University and its several departments, including this dental clinic and the Georgetown University Hospital.

It is admitted by this defendant corporation that on June 15th, 1951, the date of the occurrence out of which this action arose, it owned and operated the real estate at 3900 Reservoir Road, Northwest, out there in Georgetown -- you are probably all familiar with that location -- and operated on those premises the dental clinic which is involved here for both adults and infants.

The evidence is going to show that on June 15th, 1951, Mrs. Healy had a dental appointment for the son of her and Mr. Healy whose name was James D. Healy, and Mrs. Healy accompanied James to the dental clinic and took with her two of her other small children, Betty Ann and Thomas Patrick Healy, who is the plaintiff here.

And Jimmy was examined on the first floor in the children's clinic and was sent to the second floor in the dental surgery for a tooth extraction. And while she was waiting for Jimmy on the second floor she took the other two children, that is Betty Ann and Thomas Patrick, to the womans' restroom on the same floor which was just a door or two down the hall from the waiting room.

We will show you pictures of where the waiting room was on that floor and where this woman's restroom was in relation to it. We will show you pictures of the interior of the ladies' restroom and in words I would describe the woman's restroom as follows.

It consisted, as one entered, of a small foyer. The door opened in and up against the blank wall; that is, there was no door or window or anything and immediately in front of the entrance door there was a

blank wall and slightly to the left of that there was an entrance into the toilet facilities, and to the left of that there was another room, a waiting room or a room into which persons going in when it was crowded -- if
6 persons were coming out of the toilet facility it was necessary, because of the smallness of the entrance foyer, for one to step into that side room or waiting room and it was that room in which these lockers were located.

And the evidence is going to show that as Mrs. Healy and the two small children entered the room which contained the toilet facilities other women were coming out and it was necessary for them to step in that side room and then after the crowd had cleared -- I don't mean to indicate that there was a crowd but the traffic had cleared -- they entered the toilet facilities, and after they emerged from the room in which the toilet facilities were and out of the foyer and she got back up into the hall or waiting room she discovered that Tommy was not with her.

And she sent Betty Ann back to tell him to join them. And Betty Ann returned and said that Tommy was in this room I have described where the lockers were which was behind the door marked "woman's restroom" as I have indicated.

The outer door is marked "women", singular, w-o-m-e-n, rest-room, and then this little foyer which I have described and then off to the left is this room where the lockers are and immediately next door to that on the other wall the doors are practically meeting; that is, coming at right angles like that, practically meeting is the door into the toilet facilities.

7 Betty Ann reported that Tommy was in this room where the lockers were. And Mrs. Healy immediately went to get him and simultaneously she heard a loud crash and thud. And as she entered the room she found that the steel lockers, and they were as I have described them -- I hesitate in describing them, ladies and gentlemen, but because actually I have forgotten the dimensions of them.

My recollection is that the body of the locker was about six feet,

four and five or six inches tall, and then it had legs that were around the foot of three inches or a foot and six inches tall. So it made an overall height of about seven feet. But take those dimensions with some reservation in your mind because I am not sure in my own recollection as to the height of those lockers.

However, I am sure that the evidence will show that they were bound together in sections of three and they were the same size lockers with which all of us are familiar and they were made with steel.

And she knelt and lifted the heavy cabinet high enough to see that her son, Tommy, was lying face-down pinned beneath it. We will show because of the loud noise it created and commotion it created dental students and others arrived there to help her and a medical sergeant lifted Tommy up and carried him across the hall and at that time Mrs. Healy is going to testify that Tommy was unconscious; that is, to say,
8 he was limp. He didn't say anything. And he had all the appearances of having lost his consciousness.

The dental surgeon taped gauze around Tommy's head and turned him over to two dental students who rushed him over to the emergency room of the Georgetown University Hospital. And at the suggestion of the dental surgeon, Mrs. Healy remained with her daughter and waited for Jimmy, who was the older boy who was still in dental surgery having the extraction.

In a few minutes after that, about five or ten minutes, she went over to the hospital where she learned that Tommy had suffered a fractured skull and a bad cut in the back of his skull requiring numerous stitches and she later learned that he had also suffered a concussion of the brain.

And the evidence, the medical evidence in this case, will show that he did suffer all of those things, a concussion, a fracture and a bad laceration of the back of his head, requiring numerous sutures. Doctor O'Donnell who, the evidence will show, was a resident physician there at Georgetown University Hospital, sent Tommy to the x-ray department for complete head x-rays.

And after he was x-rayed he was returned and admitted to the hospital and his laceration in the back was sutured. And when he came out of the emergency room Doctor O'Donnell said it was necessary for him to be admitted to the hospital and it was necessary that he be attended by a neurosurgeon. And he recommended Doctor Spence, who was also a staff doctor at Georgetown University Hospital and attached to that institution.

Now, the evidence will show that necessarily we are going to have to rely in this case on the medical evidence of the defendant because the boy was hospitalized in the defendant's hospital and he was attended by the defendant's doctors. And that evidence, the defendant's upon which we are going to have to rely, will consist of the hospital records and the testimony of Doctor O'Donnell and possibly Doctor Spence who, I understand, has been subpoenaed but has not appeared.

Now, after Tommy had been assigned to a room in pediatrics Doctor Spence thoroughly examined him and attended him. Tommy remained in Georgetown Hospital from the time he was admitted on Friday, June 15th until the following Thursday when he was permitted to go home and during the period of time he was in the hospital the evidence will show that he was on a soft diet. He had penicillin twice daily, blood tests, redress of bandages and suture removal and he suffered nausea and a great deal of pain.

He was attended and had to be attended, the evidence will show, by a special nurse although the first night he was there it was impossible to get a special nurse because of the shortage of them at that time and he was attended by a relative who was a trained nurse, Margaret Fennell, on that night and for four other nights when he was in Georgetown University Hospital he was attended by a special nurse who was a stranger to Mr. and Mrs. Healy.

The evidence is going to show that both Mr. and Mrs. Healy went back to view the scene of the accident with the dean of the dental school and that at that time the dean made certain statements with respect to the room in which this accident occurred. We will offer those in

evidence and I won't state what those statements are until his Honor has ruled that they are admissible.

Now, the evidence is going to show that the defendant corporation was negligent and careless and failed to exercise reasonable care for the safety of this child because, first, of all, the lockers were made of steel. They were heavy. They were standing on a floor which was not level so that they leaned slightly forward and were off balance.

They were not bolted to the floor either by the front legs or the back legs and they, incidentally, had both kinds of legs. Although the legs of the lockers, we will show by the evidence, were so manufactured and constructed that they could have been and were intended to be bolted to the floor or otherwise fastened to the floor because holes for bolts, and the way the legs were constructed, were provided for bolts to the floor.

11 In addition to that, there were brackets at the top and back of the lockers so that they could be screwed or bolted to the wall as well. They were not fastened to the wall just as they were not fastened to the floor. In other words, these lockers were sitting there only by their own weight on this unlevel floor and were not fastened either at the floor or wall.

We expect the evidence will show that these steel lockers installed in that way, without being fastened to the floor or the wall and being unlevel and off balance and leaning slightly forward, were dangerous and constituted a dangerous condition which was a concealed or a hidden danger and by that I mean a danger which a person exercising ordinary care and reasonable care might not observe and particularly a small child and other children of tender years and elderly people would not observe.

And by that I further mean that anyone who did not know the lockers were not fastened to the floor or wall could not see and would not know of the danger which existed. And the defendant corporation, on the other hand, had negligently created that danger by placing or having those lockers placed there in that condition and they negligently

maintained that condition and negligently permitted it to continue to be maintained and they failed to give any warning of any kind to anyone
12 that those lockers in that condition were in a dangerous condition.

Now, the evidence is going to show that this hidden and concealed dangerous condition was within the area designated as the women restroom. The evidence will show that they used the word "women", w-o-m-e-n restroom. The door, well, I have already described the physical set-up of what constituted the woman's restroom. This room where Tommy was hurt had a door which was open and from all appearances it constituted a part of the women's restroom; that is to say, that it was behind the door of the women's restroom or where this floor was and where one room contained the toilet facilities and then this other room which easily appeared to be a waiting room or for use by persons who were using the woman's restroom.

Moreover the evidence is going to tend to show that the condition there was one which was attractive to children and, in fact, in this case it did attract Tommy with the result that the steel cabinets fell over against him and on him and inflicted the serious and permanent injuries to his skull and his scalp and his brain.

As a result of the negligence of the defendant corporation in the ways in which I have stated this child sustained the injuries which I may have stated to you, that is, he was rendered unconscious. He had a
13 cerebral concussion. He had a fractured skull. He had a long and deep laceration on the back of his head which required many stitches and which has left a scar.

He was hospitalized for the period I have already stated. He had special nurses, I have already stated, in addition to Margaret Fennell, a member of the family who was a special nurse or registered nurse. And the evidence is going to show that he suffered a great deal of pain.

Now the evidence is going to show that before Tommy was hurt on this occasion he was a normal, healthy, child but after these injuries to his head he developed an imbalance or a loss of equilibrium, as a result of which the evidence will show that he has had an unusual and extra-

ordinary number of falls and accidents which resulted in further injuries to him.

In other words, because of the imbalance which developed Tommy became what is called "accident prone" and he has continued to be accident prone to the present time.

The evidence will show that he was not accident prone prior to June 15th, 1951, and he did not have this imbalance or loss of equilibrium prior to June 15th, 1951. The evidence will show that he still has the imbalance which resulted from the injuries to his head on June 15th, 1951. The evidence will further show that what the doctors called an electroencephalogram was made and that is a test of the functioning
14 of the brain, not the organic condition, but the functioning of the brain. And that electroencephalogram which was made by a physician who specializes in that field shows that the functioning of Tommy's brain is abnormal.

The evidence will show that this test confirmed the observation of Mr. and Mrs. Healy, this boy's father and mother, of the imbalance which developed after the injuries to his head on June 15th, 1951. And his testimony, that is the testimony of the doctor who did the electroencephalogram will show that there is what he calls a residual or remaining post-traumatic encephalopathy.

In other words, it came from the blow on the head. He will also testify that the test shows that the functioning of Tommy's brain is abnormal. Now, the evidence is going to show that in addition to the injuries and damages which this child has suffered and will continue to suffer in the future, his father has sustained certain losses and damages consisting of expenses for doctors and hospital, nurses, baby sitters, a maid, transportation to and from the doctors' office and Mr. Healy also lost approximately six days from his employment of the value of $25 a day.

I believe the evidence will show that these expenses of his including his loss of time from his work will total something over $500.

Now, when we have proved by the evidence these facts which I have

15 outlined to you we will ask you to return verdicts in favor of this child and his father. Thank you.

MR. ANDERSON: May we approach the Bench?

THE COURT: You may.

(At the Bench:)

MR. ANDERSEN: At this time, if the Court please, I would like to move for a directed verdict on the basis of the opening statement in that the plaintiff has failed to state any cause for this accident.

Plaintiff has simply stated that the lockers fell. He has not stated the cause of the fall. He has stated that they were not bolted but should have been bolted but that still does not state the cause of the fall. He has not indicated that it was the duty of the hospital in any way or that they had failed to adhere to any of their duties or to perform their duties.

He has simply stated that these lockers created an attractive nuisance but has not indicated in any way how this locker attracted the plaintiff in this case.

And on the basis of the statement made the jury cannot find for the plaintiff and I think the Court should grant a motion for a directed verdict at this time.

THE COURT: The motion of the defendant is noted in the record and the motion is overruled.

16 MR. ANDERSEN: Now, if it please the Court, I notice that the plaintiff has the mother sitting at the counsel table. The mother is not a party to this action and will simply be a witness, and I think that the parties alone should be at the counsel table.

MR. HILLAND: She is going to be the first witness, your Honor.

THE COURT: Well, then there wouldn't be much point, if she is going right on the stand now --

MR. ANDERSEN: All other witnesses have been excluded. Why should she be privileged?

THE COURT: You mean during your statement?

MR. ANDERSEN: No. All witnesses have been excluded, all

other witnesses.

THE COURT: I know but she is going on the stand right now. Are you going to make an opening statement?

MR. ANDERSEN: Yes.

THE COURT: Well, you want her excluded during your opening statement because she will go on the stand, as I understand it.

Is that right?

MR. HILLAND: That is right. She will be the first witness.

MR. ANDERSEN: No, I think we should follow the standard procedure.

17 THE COURT: That is right. She is not a party.

MR. HILLAND: All right. I will tell her.

(End of Bench conference.)

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

By: Daniel J. Andersen, Esquire

MR. ANDERSEN: Ladies and gentlemen of the jury: By way of explanation, Mrs. Healy is a witness in this case and is not a named party. Therefore, she, along with the other witnesses, are excluded from the courtroom and the only parties that are allowed to sit at counsel table are the parties themselves.

Now, you have heard the opening statement of Mr. Hilland, the attorney for the plaintiffs. Now, it becomes my duty to give an opening statement and to outline to you the position of the Georgetown University Hospital or the dental clinic.

It is true that on the 15th of June 1951, Mrs. Healy together with her three children went to the dental clinic at Georgetown University Hospital. Now, the testimony of the defendant will show that the dental clinic is operated by the dental school and that people can go to the dental clinic for dental care at a substantially reduced price for dental care, and that Mrs. Healy brought her son to the dental clinic for this dental care.

The testimony will further show that Mrs. Healy went to the

18 dental clinic and she had with her the three children and that one

of the children was being taken care of and the other two children were running rampant in the hallways.

The testimony will show that it was necessary for an attendant at the clinic to speak to Mrs. Healy and tell her to keep her children in tow and to stay in the reception room, which is a room off of the main corridor, and to keep her children there. The testimony will further show that Mrs. Healy did not do that. She permitted the children to run, nevertheless, and that the child apparently did go into this room, which is a locker room for the students of the dental clinic and which is not a part of the ladies restroom.

And the testimony will show that neither Mrs. Healy nor her children had any business whatsoever in that locker room. But, nevertheless, the child, because he was not properly attended, went into this locker room and an accident occurred.

Now, we will show that these lockers have been there for some nine years and that at no time have they ever had an accident with the lockers or that the lockers had fallen or that they were unstable in any way. We do not know, the defendants do not know what caused this accident, but the defendants will show and the Court will instruct you as to the law upon the completion of this case that there was no
19 responsibility of this --

MR. HILLAND: I object to his stating what your Honor is going to instruct the jury on, your Honor. He doesn't know any more than I do.

THE COURT: I think you can limit yourself to stating what you intend to prove. That is the province of the opening statement.

MR. ANDERSEN: Yes, sir.

We will show that there was no responsibility on the part of the defendant for the welfare of this child under the circumstances, and if we produce that evidence to your satisfaction we will ask you, ladies and gentlemen of the jury, to return a verdict for the defendant.

MR. HILLAND: Will you call Mrs. Healy, please?

Thereupon

MRS. JAMES D. HEALY

was called as a witness for and on behalf of the Plaintiffs, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

MR. ANDERSEN: May we approach the Bench, if the Court pleases?

THE COURT: You may.

(At the Bench:)

MR. ANDERSEN: I am sorry but I was about to overlook one item which I would like to get in the record at this time. It may take some argument and your Honor may want to exclude the jury for a few minutes while you consider it.

It has to do with a series of motions that have been filed since the last time the case was called.

THE COURT: Yes, the Court noted that there was an undisposed of motion --

MR. ANDERSEN: That is right.

THE COURT: -- but the Court further noted that it was to be submitted to the pretrial court. The case has already been pretried but the way the order is drafted and the Court executed the order it reads as follows:

> "This cause came on to be heard by the Court upon the motion of defendants to dismiss and upon the motion of the plaintiffs for leave to file security for costs, and thereupon, upon consideration thereof, and it appearing to the Court that the defendants should be given the opportunity to file a motion to vacate the previous order allowing the filing of security for costs, and it appearing that the matter should be heard by the pretrial judge, it is, by the Court," -- etc.
>
> "ORDERED, that the said matters be set over for a hearing before the pretrial judge."

Well, I don't know the circumstances of the pretrial. It has already taken place.

MR. ANDERSEN: I would like to get this in the record and I think it will take a little bit of time. Maybe you can excuse the jury for five minutes or we can do it at the Bench, if your Honor desires.

THE COURT: Well, you can do it briefly here. It is quite a job to collect them again. It takes up that much time.

MR. ANDERSEN: This case was called to be tried before Judge Matthews last year. At that time we entered the Chambers of Judge Matthews and had some preliminary conversation before trial and it was determined that the plaintiffs had not complied with the order of this court in filing their security for costs.

The judge at that time continued the matter and gave the plaintiff the right to approach the pretrial judge to obtain authority from the pretrial judge to file a motion for the right to file a security for costs late.

Your honor was then sitting as the pretrial judge.

THE COURT: Yes.

MR. ANDERSEN: The day following or shortly thereafter -- maybe it was the same day -- the attorney for the plaintiff came to my office with a motion which he intended to file, seeking authority to file the security for costs late. I was then in trial and indicated that I would have no objection to the filing of that motion. Thereafter the attorney for the plaintiff appeared before your Honor and presented to your Honor an order authorizing the filing of the security for costs.

THE COURT: Wasn't that an order denying defendant's motion to vacate?

MR. ANDERSEN: In the meantime, I filed an opposition to that motion and I fully --

THE COURT: Well, I asked a question. Did I sign an order authorizing the filing of the security for costs or didn't I, rather, sign an order denying defendant's motion to vacate --

MR. ANDERSEN: As I have just indicated, your Honor signed an order --

THE COURT: What was the date of that?

MR. ANDERS EN: -- authorizing the filing --

THE COURT: Yes, I heard you.

MR. ANDERSEN: -- the filing of the security for costs.

THE COURT: All right. What was the date of that? Do you know the date of it?

MR. ANDERSEN: No, I don't. It was prior to that, I am sure.

THE COURT: Yes, I find it. May 10th.

MR. ANDERSEN: May 10th. Now, in the meantime, of course,

23 I had filed my opposition to that motion and then I filed a motion to dismiss.

I did not know and did not receive from the plaintiff a copy of that order permitting the filing of the security for costs until the motion to dismiss was called for hearing at which time the plaintiff notified me that your Honor had signed an order authorizing the filing of the security for costs without a hearing on the motion.

The Court felt that the matter was, therefore, moot since the security for costs had already been filed.

THE COURT: Yes.

MR. ANDERSEN: The matter then came back to your Honor and your Honor suggested at the time that the motion should be brought to the attention of the trial judge.

Now, I am making that motion again for the record and I feel that on the basis of the law that the case has to be dismissed. The Title of the District Code provides that -- Title 11 Section 1506 -- provides that in case of non-compliance with the foregoing requirements within a time to be fixed by the court judgment of non-suit or dismissal shall be entered.

Now, Rule 6 of the Federal Rules of Civil Procedure leaves some discretion to the court and it reads in part that the court for

cause shown may at any time in its discretion, Paragraph 2(2), upon motion made at the expiration of the specified period permit the act
24 to be done where the failure to act was the result of excusable neglect but it may not extend the time for taking any action under the Rules.

And then 60(b), except to the extent and under the conditions stated in them. Now, Rule 60(b) of the Federal Rules of Civil Procedure provides that on motion and upon such terms as are just, the court may relieve a party or his legal representatives from a final judgement order or proceeding for the following reasons: One, mistake, inadvertence, surpise or excusable neglect. The motion shall be made within a reasonable time and for reasons, one, not more than one year after the judgment order or proceeding was entered or taken.

Now, the facts in this case will show that more than one year expired within which the plaintiff did not comply with the order of the court and that no action was ever taken by the plaintiffs within the period of time for authority to comply with the orders of the court.

And I think that on the basis of the facts and on the basis of the law this case should be dismissed.

MR. KINDNESS: Your Honor, I think there is no question in your mind in that this was argued before your Honor previously; that Rule 60(b) of the Federal Rules of Civil Procedure does not apply to this case. This is not a final order of judgment or decree.
25 This is not an appealable order. There was an order requiring the filing of security for costs. That is the question and there will be no appeal allowable from that order. Therefore, Rule 60(b) does not apply. However, Rule 6 does apply -- is that subsection (c) or (b)? I am sorry. I don't have my --

MR. ANDERSEN: Subsection (b).

MR. KINDNESS: Which Mr. Andersen just quoted, subsection (b) of Rule 6 does apply and it clearly sets out that it is within the discretion of the court to determine the question of extension of time in a matter

of this nature.

THE COURT: What do you have to say is the qualification of the rule in that it applies to final orders?

MR. ANDERSEN: 6(b)?

THE COURT: A motion upon such terms to relieve the party of proceeding?

MR. ANDERSEN: Your Honor is asking me a question?

THE COURT: Yes.

MR. ANDERSEN: Rule 6(b) --

THE COURT: I am talking about 60. I say, on what ground do you contend that 60 is applicable under 6(b), in view of the fact of what Rule 60(b) provides? This is not a final judgment.

MR. ANDERSEN: I would like to answer the question this way, if the Court please. Rule 6(b) specifically refers to the limitation set
26 forth in 60(b). Therefore, 60(b) is applicable in this instance and as to whether or not it is a final judgment, obviously it is not a final judgement but the rule reads final judgement -- comma - order or proceeding for the following reasons.

Now, in this case we have an order --

THE COURT: Your contention is that the word "final" does not apply to order?

MR. ANDERSEN: I contend that it does not apply to order and furthermore even if it did, it is a final order of the court with reference to the motion that is pending.

THE COURT: It wouldn't be such as indicated? I don't think you are serious about that. I don't think a ruling on a motion is a final order.

MR. ANDERSEN: I think that we all have different opinions but this speaks of an order --

THE COURT: Yes.

MR. ANDERSEN: And we have an order here which required the plaintiffs to do a certain thing within a certain period of time which

they did not do. And I think that 60(b) is applicable.

THE COURT: Well, I am afraid I would have to conclude that 60(b) is applicable to final orders and the Court in the exercise of its discretion will deny the motion seeking to have the Court set aside its ruling on defendant's motion to vacate the order. That is the standing of the situation at the present time.

MR. ANDERSEN: I don't understand the ruling.

THE COURT: On consideration thereof, it appearing to the Court that the defendant should be given opportunity to file a motion to vacate the previous order allowing the filing of security for costs. I take it that is what you are trying to do here, are you not?

MR. ANDERSEN: Well, I am, --

THE COURT: While a motion praying the Court to vacate the previous order allowing the filing of such --

MR. ANDERSEN: I am renewing --

THE COURT: That is the last order that the Court has entered.

MR. ANDERSEN: I am renewing the motion to dismiss.

THE COURT: Well, that is the only motion you are arguing now, the motion to dismiss?

MR. ANDERSEN: Well, renewing the motion to dismiss and, of course, this for your reconsideration of signing the order permitting the filing of the security for costs prior to a hearing on the motion.

THE COURT: Now, the Court's position is this. It doesn't feel that 60 is applicable. It would appear that 6 is applicable. It seems to be a matter within the discretion of the Court. The court has not been persuaded by anything that has developed so far that the defendant would be prejudiced by allowing -- if the Court should adhere to its ruling -- the plaintiff to file security for costs or to continue the security for costs which have already been filed.

And so far as the motion to dismiss is concerned, the Court has not been persuaded that the motion to dismiss should be granted unless the motion to dismiss is grounded upon the failure of the plaintiffs to file security for costs within the time.

Is that the basis of the motion?

MR. ANDERSEN: Yes, it is.

THE COURT: I see. Well, then the Court will ask that the Clerk so enter this in the record: The motion now made at the Bench by defendant's counsel to dismiss plaintiffs' complaint and to vacate the Court's previous order allowing the filing of security for costs by the plaintiffs is overruled.

* * * * * *

50 MRS. JAMES D. HEALY

was recalled as a witness for and on behalf of the Plaintiffs, and having been previously duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. HILLAND:

Q. Will you please state your name? A. Mrs. James D. Healy.

51 Q. What is your address? A. 4419 Montgomery Avenue, Bethesda, Maryland.

* * * * * *

Q. * * * What is your age, Mrs. Healy? A. I am thirty-five.

* * * * * *

Q. Are you married or single? A. I am married.

Q. And what is your husband's name? A. James D. Healy.

Q. And he lives with you? A. That is correct.

Q. Do you have a son named Thomas Patrick Healy? A. Yes, I do.

Q. What was his birth date? A. November the 19th, 1947.

* * * * * *

52 Q. * * * Prior to June 15th, 1951, had you or any member of your family had any connection with Georgetown University? A. No, we had not had any connection with Georgetown prior to that date.

* * * * * *

Q. What part of Georgetown had you had no connection with?

A. The hospital. I was taking the children to the dental clinic prior to that day.

* * * * * *

Q. All right. On June 15th, 1951 did you have an appointment at the dental clinic? A. Yes, I did.

Q. And at what time was the appointment? A. As I recall, I think it was an early afternoon appointment, one o'clock, or thereabouts.

Q. And who accompanied you on that occasion? A. I had three of my children with me; my oldest boy, James was going to be worked on at the dental clinic, and I had along with me my daughter, Betty Ann --

* * * * * *

53 -- and my younger son who was a baby at the time, Thomas Patrick, age three and a half.

Q. Now, where did you go when you first went to the dental clinic, you and the children? A. We went to the first floor where there is a children's clinic and we waited while Jimmy was back there being worked on, and we were told he was to have an extraction and that would be done on the second floor of that same building.

So we all proceeded upstairs where we were shown to wait in a waiting room while Jimmy was being worked on across the corridor in a place called surgery. I think it was called oral surgery.

And that is what we were doing, waiting while Jimmy was being worked on on the second floor of the dental clinic.

* * * * * *

55 Q. Mrs. Healy, will you state what occurred after you and the children arrived on the second floor of the dental clinic where the oral surgery department was? A. Yes, sir. We were seated in the waiting room across the hall from where Jimmy was being worked upon and we got up to go down to the ladies bathroom which was a very short distance away from the waiting room.

About from here to the end of the table, possibly, where Mr. Kindness is seated is the distance. On the left there is a sign that said

ladies room and that is where we entered.

* * * * * *

56 Q. Mrs. Healy, I show you what has been marked for identification as Plaintiff's Exhibit No. 4-A, the letter A, and ask you whether or not that shows what you referred to as the waiting room? A. Yes, it is.

* * * * * *

57 Q. Mrs. Healy, will you point to what you call the waiting room? A. Right where it is written "waiting room" which is directly cpposite oral surgery room where Jimmy was inside being worked upon. This is where a nurse sits, a reception desk, and we were asked to step

58 into that room to wait.

Q. It is the room across from the oral surgery room? A. Yes.

Q. The hall you see is the hall through which you go to get into the waiting room. Is that correct? A. That is correct. And we were seated in this room waiting while my oldest boy was to the left of the same corridor in the dental chair.

MR. ANDERS EN: Is this a picture of the room in which you were waiting?

THE WITNESS: It is the picture of the approach to the room where I was seated waiting, where it says "waiting room".

MR. ANDERSEN: Is this a picture of the room where you waited?

MR. HILLAND: She said no.

THE WITNESS: No, sir. I was in that room.

MR. ANDERSON: In what room?

THE WITNESS: In the room here where it says "waiting room".

MR. ANDERSEN: Is this a picture of that room or is this just a picture of the sign showing where the room is?

THE WITNESS: This is a picture of the appearance as it is today of the second floor corridor at the oral surgery department of the dental

59 clinic at Georgetown University.

* * * * * *

61 Q. Mrs. Healy, I now show you Plaintiffs' Exhibit No. 4-B for identification and ask you --

* * * * * *

62 Q. Again calling your attention, Mrs. Healy, to Plaintiffs' Exhibit No. 4-B, and I am directing my inquiries, all of these to conditions existing on June 15th, 1951 - not today, but then - this picture shows what? A. This picture shows an open doorway into the women's restroom.

Q. Of which now there are two doors. Are you pointing to the right or the left door on the picture? On the right side or the left side of the picture? A. I am pointing to the right side of the picture, as you step into the womens restroom.

Q. Now, that door to which you are pointing on the right side of that picture or doorway, is that also shown on Plaintiffs' Exhibit 4-A which the jury has already seen? A. No, you can't see it fully.

Q. Well, can you see it partly? A. Yes, you can.

Q. And how is it identified in the picture which the jury has already seen? A. It is identified by being inside the entranceway where it is designated ladies.

Q. Yes. In other words, this door which you have said -- if this
63 is correct -- the door on the righthand side of Plaintiffs' Exhibit No. 4-B which is open is the same doorway as shown under the sign "ladies" in Plaintiffs' Exhibit 4-A? A. That is correct.

Q. Now, what is the other door that is shown in Plaintiffs' Exhibit No. 4-B, this one right here? What is the other door that is shown here? A. The other door is a door that is in a closed position which is beyond -- is where the oral surgery department was.

Q. All right. Can you see the entrance or sign to the entrance on the waiting room in the picture you are holding? A. Yes, I can.

Q. That is 4-B? A. Yes, I can.

Q. And where is that in that picture? A. It is behind the --

Q. Well, will you point to it? A. It is behind the doorway.

Q. In other words, -- A. It projects in the corridor.

Q. In other words, about a quarter down from the top and toward the left of that picture? A. That is correct.

Q. Now, is the door that one sees near that picture -- I mean,
64 that sign "waiting room" sign open or closed in the picture you are holding? A. The picture I am holding the door is closed. It is a partial door there.

Q. Is that a single or a double door? A. It appears to be part of a double door; the single panel of a double door.

Q. Is there any relationship between that double door and the double door which is shown in Plaintiffs' Exhibit 4-A which the jury has already seen and which doors are open? A. Yes, it is. In Exhibit 4-A the door is standing pulled open immediately under the sign saying ladies. And Exhibit 4-B the door is closed.

Q. One side is closed? A. One side of the door is closed. The door consisting of two panels that close and joint together.

Q. Now, in either of the pictures which you have spoken of is the door itself shown into the womens room, the door itself as distinguished from the entrance to the womens restroom? A. The door itself that has marked on it women restroom is not shown in either 4-A or 4-B.

Q. All right. I show you Plaintiffs' Exhibit No. 4-C and ask you whether or not it is shown in that picture? A. Yes, it is.

65 Q. Now, in that picture, 4-C, is that door to the womens rest-room open or closed? A. It is opened.

Q. And that picture is taken from what position? A. Oh, I beg your pardon. I can't judge now whether it is opened or closed. The two doors joined have me confused. I believe it is closed but I am not positive. It appears to be closed. I am mixed up.

* * * * * *

Q. Do you know from what room that picture was taken? A. No. Oh, I imagine it was from the doorway here inside.

Q. Inside of what? A. The waiting room. It is not necessarily a waiting room. It is a doorway there that is opened where these

metal lockers are.

Q. All right. Now, in Plaintiffs' Exhibit 4-B one can see some metal lockers? A. That is correct.

Q. Are they in a separate room inside there? A. They are in through this doorway in a separate room. It is inside the doorway of the bathroom.

Q. Is that the room to which you referred that this picture was taken from? A. That is correct.

66 THE COURT: Which picture now are you speaking of?

MR. HILLAND: 4-C. 4-C.

BY MR. HILLAND:

Q. Is that correct? A. I believe it is.

Q. All right. That picture was taken from the room in which the lockers are, the steel lockers? A. That is correct, I do believe.

Q. And that shows the door into the womens restroom opened or closed? A. It shows it opened.

Q. All right.

MR. HILLAND: I offer those two pictures in evidence.

THE COURT: Now, you state two pictures.

MR. HILLAND: 4-B and 4-C.

THE COURT: 4-B?

MR. HILLAND: Yes, your Honor.

THE COURT: And 4-C.

MR. ANDERSEN: When were these pictures taken, Mrs. Healy?

THE WITNESS: I don't believe I can give you the exact date.

MR. ANDERSEN: Who took them?

67 THE WITNESS: It's been at least two or three years ago and my husband took those pictures.

MR. ANDERSEN: He did?

THE WITNESS: Yes.

MR. ANDERSEN: I am trying to understand 4-C. And you say that is the door that leads into the womens restroom?

MR. HILLAND: Which one are you referring to now, Mr. Andersen?

MR. ANDERSEN: 4-C.

MR. HILLAND: 4-C.

MR. ANDERSEN: Is that the inside door or is it the outside door?

THE WITNESS: I can best explain it to you with the help of this picture.

THE COURT: When you say "this picture" please mention the number.

MR. ANDERSEN: 4-A.

THE WITNESS: I am sorry. 4-A. Here it says ladies and immediately underneath that sign I believe I am correct, when this door is closed it says women restroom. This closes onto the main corridor.

This door, if closed, would be -- see, it is in this hallway here where these metal cabinets are.

MR. HILLAND: Will you keep your voice up, please?

THE COURT: I call your attention to the fact that although counsel

68 is close to you this conversation is not a conversation between yourself and --

THE WITNESS: I am very sorry.

THE COURT: -- the attorney. It is a part of the record and all the jurors must hear every word said. So please keep your voice up.

THE WITNESS: Yes, sir.

MR. ANDERSEN: I am sorry, I was thrown off here. You say that this door is one that faces onto the corridor.

THE WITNESS: When closed. That is right.

MR. ANDERSEN: Now, was there another door leading into the ladies restroom?

THE WITNESS: As you open this door you stand in a very small foyer there and then there is another door straight ahead that has a plain glass window on it -- no writing at all.

Behind that door are two toilets.

MR. ANDERSEN: I see.

THE WITNESS: Also a very narrow space --

MR. ANDERSEN: That is what I wanted to get straight and this door is the one that is in the corridor, faces into the corridor, which is Exhibit No. 4-A?

THE WITNESS: Exhibit 4-A when closed is -- to read the sign on it you must be standing in the corridor but it does not face into the corridor. It faces into the foyer.

69 MR. ANDERSEN: When you say "faces" --

THE WITNESS: As I open it.

MR. ANDERSEN: -- it opens in instead of out?

THE WITNESS: That is correct.

MR. ANDERSEN: I see.

THE WITNESS: I open it in like it is an open standing position there, it has been opened and it is back against a little wall there and the very next door in front of us is the door that approaches the toilet room.

MR. ANDERSEN: I see. Now, you stated that these doors were there at the time?

THE WITNESS: That is correct.

MR. ANDERSEN: And were these doors closed at that time?

THE WITNESS: To the best of my knowledge and recollection, and I think it is accurate, this door was closed as it is in that picture.

MR. ANDERSEN: Speaking of that picture, she is referring to 4-B.

THE WITNESS: Yes, but I am not positive of whether the doors were opened or closed. But I am almost certain that this partial panel which is one section of that door was standing in a closed position and the other door was standing open.

So that we had free passageway up and down the corridor there

70 in the waiting room.

MR. HILLAND: Keep your voice up.

THE WITNESS: I am very sorry.

MR. ANDERSEN: You are not sure of that though. Is that right? That is just your impression at the moment?

THE WITNESS: It is more than an impression, Mr. Andersen. I am fairly certain that one half of the door was closed and one half of the door wss opened.

MR. ANDERSEN: I see. If the Court please, I have no objection to Exhibits 4-B and 4-C.

THE COURT: Plaintiffs' Exhibits 4-B and 4-C respectively will be received in evidence.

(Thereupon the photographs heretofore marked Plaintiffs' Exhibits Nos. 4-B and 4-C respectively for identification were received in evidence.)

(Thereupon the aforementioned exhibits were submitted to the jury.)

MR. HILLAND: This is 4-B and 4-C and here is the 4-A if you want to see that again in connection with them.

THE COURT: The Court will inquire as to what exhibits are now being shown to the jury? All three?

MR. HILLAND: 4-A, B and C.

BY MR. HILLAND:

Q. Now, Mrs. Healy, I show you what have been marked as Plaintiffs' Exhibits 4-D, E and F and I will ask you first about 4-D.

71 That shows what as of June 15th, 1951? A. This shows the toilet door.

Q. Taken from where? Does it show any other entrance other than that door? A. Well, in the very far lefthand corner of the picture you can see the framework of another door.

Q. And that is a door into what? A. Into the room where the metal cabinets are.

Q. And this entrance that is in the foreground of that picture is what entrance? A. That is the entrance to the womens restroom.

Q. And if that door -- if the door to that entrance were closed would that be the door that has the words women restroom -- A. That is --

Q. -- on it? A. That is correct.

Q. Now, I show you Plaintiffs' Exhibit No. 4-E and ask you what that picture shows? A. This picture shows the door that is labelled

women restroom opened from the main corridor.

Q. And immediately in front of it it shows what? A. A blank wall.

Q. And that is a wall of what room within that door? A. That
72 is the wall of the little foyer that when that door swings open you step into this room and that wall is blank to the left. There is a doorway that has nothing on it and it is behind that door are the toilets.

Q. Yes. Now, to the left of that picture you can see the frame work of a door. That is the door into what? A. Into the toilets.

Q. Now, I show you Plaintiffs' Exhibit No. 4-F and ask you what that shows, what doorways and what doors? A. This picture shows the doorway into the area where the metal cabinets were that fell; to the fraction of a right, if you came out of that doorway it shows a partial framework of the door that enters into the room where the actual facilities and bathroom are located.

Q. Are those file cabinets in that light which one sees in the picture to which you have just referred, that is 4-F, the same file cabinets and the same light fixture in the top that is shown in Plaintiffs' Exhibit 4-B? A. That is correct. They are one and the same area and cabinets.

* * * * * *

75 Q. Mrs. Healy, I show you what has been marked as Plaintiffs' Exhibits G, H and I for identification and I ask you if you can identify what is shown in each of those three pictures? A. Well, in the first picture I hold in my left hand, it is marked 4-G, and it shows the bottom part of these lockers and the legs, the first two legs appear in
76 this picture as they appeared in the room.

And Exhibit 4-H, it shows the full length of the wall of these same lockers. You can see the top of them where the little bracket is, where they could have been affixed to the wall and you can see the bottom of them also rather plainly where there were further brackets at the bottom of the feet.

It shows where the doors are and Yale locks or some kind on each door. It is apparent from this picture that --

MR. ANDERSEN: If the Court please, I object to the interpretation.

THE COURT: Don't interpret the pictures. Just state what it shows without your conclusion.

THE WITNESS: It shows the lockers and I think it shows that they are joined in sections. Is that enough?

BY MR. HILLAND:

Q. How about the third picture? A. The third picture is marked 4-I. It shows the base structure of the lockers as the legs rest on the floor. It also shows the clamps and holes where they could be affixed --

MR. ANDERSEN: I object, if the Court pleases.

THE COURT: Just --

THE WITNESS: I am trying to describe the holes that are in the bottoms of the legs.

77 THE COURT: Just state what it shows and not what it might show.

THE WITNESS: Well, it shows holes in the bottom of the legs at the bottom of that picture and the bottom structure of the lockers.

* * * * * *

79 MR. ANDERSEN: Were these lockers all locked in 1951?

THE WITNESS: Sir, I didn't try to open them or ascertain whether they were locked or unlocked.

MR. ANDERSEN: Did they have locks on all of them?

THE WITNESS: Well, the pictures, that shows several locks on several doors. As of the date of the accident I cannot tell you whether they had locks on them or off of them or whether they were locked or unlocked.

We went back --

MR. ANDERS EN: Then there may be a difference between these pictures and the situation in 1951. Is that right?

THE WITNESS: Oh, as to the number actually in use at this time

80 or being used or being locked or unlocked, there could be a difference, of course.

MR. ANDERSEN: You don't have any knowledge as to who was using these lockers or how many were being used?

THE WITNESS: The only knowledge I have is Doctor Rault's statement that they were used by the nurses.

* * * * * *

THE COURT: Plaintiffs' Exhibits Nos. 4-G, 4-H and 4-I, respectively, are received in evidence.

* * * * * *

81 Q. Mrs. Healy, what was the approximate height of the lockers shown in Plaintiffs' Exhibits 4-G, H and I? A. The lockers, I believe, are six feet high approximately plus whatever depth there is to the legs.

Q. And about how high were the legs? A. Six or seven inches, I believe.

Q. What material were the lockers made of? A. Well, I would say they were metal or steel lockers. They make a noise when you click them.

Q. What was the weight of your son, Tommy, on June 15th, the size and weight of your son, Tommy, on June 15th, 1951? A. Well, Tommy was an average three-year old. In height I don't know what that average would be. I suppose Tommy is four feet now, is he? And then he would be, I suppose, easily three feet or less.

He weighed I would guess approximately thirty-six pounds, around there, a three-year old, thirty-eight, forty pounds. I can't say for sure.

Q. When this door shown in Plaintiffs' Exhibit No. 4-C which as I understand it is opened in this position, but I refer to the door with the words "women restroom", when that door was closed what space or spaces were within the enclosure made by that door when it was closed? In other words, what was behind the door? A. I am looking

82 at 4-C. It says women restroom. It is opened and behind that door is a blank wall. As you stand there on the floor, as you open the door, it is this very small area.

Q. About what are the dimensions? A. Three and a half by five and a half, I would say. Three and a half.

Q. Are you speaking in feet now? A. That is correct. Three and a half feet by five and a half feet, in the position this way; that if you go to approach the next door, which would be the toilet room, there are five and a half feet is that way, depth, which is to go into the next room the space is three and a half feet.

Q. It is five and a half feet in front of you. Is that what you said? A. No, as I walk in this door that is opened I would have to continue straight ahead to open the next door. I believe I am correct in saying that the distance there is about three and a half feet from that door to the next door. And the space this way would be --

Q. All right. From that blank wall to the door to the locker room is what length? A. Five and a half.

Q. And from that door to that blank wall that is in front of that door when it is opened, that is what width? A. Three and a half feet.

83 Q. All right. What other areas are behind that door when it is closed? A. Behind the door I am looking at in Exhibit 4-C marked "women restroom" is a blank wall; two doors that are at angles adjacent to each other. One was an open doorway wherein the lockers stood.

The other is a door that was closed that went into where the toilet facilities were; all on this one area three and a half feet by five and a half feet.

Q. All right. Now, when you went in that morning on June the 15th, 1951, will you state whether or not the door to the room where the lockers were was open or closed? A. That door was open.

Q. All right. Now, as you went in and got behind that door marked "women restroom" did you have occasion to go into the room, you and the children have occasion to go into the room where the lockers were? A. As we opened the door from the main corridor and stepped into that small foyer we were forced to step into the room adjoining there. The doorway was opened. We had to step in there for the lady and the

other child coming out of that room to pass in that small foyer.

We couldn't both pass. One must step aside so that the other may pass in or out.

84 Q. And did you-- A. So we stood there just momentarily before we went into the door where the toilet facilities are.

Q. Now, when you came out of the room where the toilet facilities were and out of the foyer, which you have described, behind the door marked "women restroom" where did you go? A. As we left the bathroom, the room wherein the toilets were, we had to pass again through that small foyer to the main corridor.

Again people were coming in and we stepped aside or they stepped aside that time -- we went out. It is very hard to describe without your seeing it but it was a very short space-distance. Betty Ann was beside me and I said, "Where is Tommy?" And we both turned and Tommy wasn't with us and, say, from here to you or even less distance, occurred the crash. Tommy wasn't away from us except long enough to observe that he wasn't with us. That is, along side us.

Q. Can you estimate the time that elapsed between the time you saw Tommy and then realized that he wasn't with you? A. It wasn't more than a minute, if that. We just merely rounded the corner and Tommy wasn't there. And in a split space of time we turned to get him and before we got him -- I believe I understood you to say earlier that Betty

85 Ann went back for Tommy. I don't know whether I told you that or not. We both went together back for Tommy but when we got there Tommy had been hurt and it was a very short space of time. Minutes.

Q. When you say "we both" -- A. Betty Ann and I were together. I said, "Get Tommy" and started with her but before we arrived for Tommy the crash occurred.

Q. Will you describe the conditions in the locker room when you arrived in the locker room? A. Well, as we went right back around the corner into the room, the entrance to the room was blocked by the lockers, the point of the lockers lying full into the doorway. The room

is covered with the lockers. Tommy was under it. I couldn't see Tommy but you could see blood. And I went down immediately and with assistance from someone, who was close by and came for the crash, lifted the locker, and had lots of assistance then from people there.

He was scooped up. He was a mess, and taken into a room across the corridor where they wrapped him in gauze and took me to a chair.

Q. Well, now, when you came into the room where the lockers were did you see how many lockers were on top of Tommy? A. Mr.

86 Hilland, the room was covered with lockers. It is a small room. It is a narrow room and all I could see was lockers. I couldn't get into the room for the lockers on the floor nor could I see Tommy except for the mess until we lifted the lockers.

Q. Did you observe whether or not the lockers were single, double or triple lockers? A. From the pictures I have observed. At that moment all I observed was that the floor was full of these lockers; that we couldn't go into the room. You couldn't walk around them.

The room was covered; with the short space there I guess they were --

Q. Who excavated Tommy from under the lockers? A. There was a gentleman in uniform who was attached to the dental clinic, I believe, who actually helped me and did the lifting, I suppose, and we got Tommy out from under.

Q. Were you able to lift the lockers off of Tommy? A. Well, it all happened so quickly. I went down and I hoisted, but I am sure I had assistance in actually getting him up, suspending them and getting the child out. They were too heavy for me to do alone.

Q. Was Tommy able or unable to extricate himself from the lockers?

87 A. Tommy wasn't even visible except for the blood and Tommy was very seriously hurt and I believe unconscious. And he surely couldn't have gotten up. * * * *

Q. Did he scream out then? A. No, not then. The only thing I heard was the thud of the lockers other than the noise and the commotion that --

Q. Did you see him as he was lifted out from under the lockers or when they were lifted off? A. That is right. I was right there.

122 CROSS EXAMINATION

BY MR. ANDERSEN:

Q. Mrs. Healy, you stated early in your testimony that you had been to the dental clinic prior to this time.

MR. HILLAND: She didn't say that at all.

THE COURT: Well, let the witness state if she did say it or didn't say it.

THE WITNESS: Prior to June 15th, 1951?

BY MR. ANDERSEN:

123 Q. Yes. A. Jim, the oldest boy, had been there prior to that date for dental work.

Q. You had been there? A. And I had accompanied Jim there before. Tommy had not been there before to my knowledge.

Q Was Tommy there for any work to be done on that day? A. No.

Q. In other words, then the work that was to be done at the dental clinic was on James? A. That day? That is correct.

Q. Only. A. I am almost certain it was -- later Betty Ann had some dental work done but only that day was Tommy scheduled and the others were in my care accompanying me.

Q. Now, how old was Betty Ann at that time? You say she is eleven now? A. She will be twelve in January. So this is 1951- four years ago Betty Ann was seven going on eight. About seven and a half.

Q. And James was how old at that time? A. Approaching nine or was nine. He is now thirteen. He was eight. There is fifteen months difference between Betty Ann and Jim, so however --

Q. So that these children at that time in 1951, James was nine, Betty Ann was seven, and Thomas was three and a half? A. That is correct.

124 Q. And, as I understand your testimony, you went first to the first floor for attention to James? A That is right.

Q And then after that you went to the second floor? A. That is correct.

Q Now, when you went to the second floor did you take James into

the surgery department? A. James left me at the door to the entrance to surgery. We stopped. We spoke to the nurse at the desk, handed her the slip of paper that we were given to take from the first floor to the second floor, and then James was taken into the room to the left and we were asked to go and wait for him in the waiting room.

Q. And then did you go directly to the waiting room? A. Yes, we did.

Q. And did you take both children in the waiting room with you? A. Yes, we waited there sometime, reading magazines.

Q. And were the children in the waiting room at all times during this period? A. That is correct, except for the time that we got up and went together to the bathroom.

Q. And how long after you arrived did that occur? A. The trip to the bathroom?

125 Q. Yes. A. I think we had been seated there easily a half hour to forty-five minutes, waiting.

Q. And the children were with you all that time in the waiting room? A. That is right.

Q. They were not in the corridor? A. No, they were not.

Q. Do you recall anybody speaking to you about keeping the children in the waiting room? A. No, indeed, sir, except to be shown where we could wait for Jim at the time that we went in there to sit down.

Q. And -- A. There were other people waiting; other children there.

Q. And you were told to go in the waiting room and wait? A. I don't know that we were told specifically. We were shown where we could sit to wait and read magazines and be comfortable until he was ready.

Q. And then I understand from your testimony now then that you waited in this room until you went to the ladies room? A. That is right.

Q. And then when you returned from the ladies room did you go back to the waiting room? A. Well, when we came out of the ladies
126 room, the women restroom, within a minute the accident occurred.

Q. Had you gotten back to the waiting room, is what I am driving at. A. Oh, I understand. No, I hadn't entered the waiting room. I was on my way back. I was in the corridor which is a very short distance from the restroom to the waiting room and we had not gotten to the waiting room. We were practically at the waiting room. It is hard to describe it. To the best of my memory we were approaching the waiting room. I looked down. Tommy wasn't with me. I said, "Betty Ann, where is Tommy?" We turned and went and the crash occurred before we actually --

Q. You both turned at the same time? A. Yes, as I remember it.

Q. And went back to look for Tommy? A. Yes.

Q. And then after you turned you heard this crash? A. That is right.

Q. Now, as I understand it, you also testified that when you went into the ladies room there were people coming out? A. When we went into the women restroom there were people coming out of the toilet room.

127 Q. How many people? A. Well, as I recall, there were two women and there was another child coming out.

Q. And you waited at the door for them to go out before you went in? A. We waited in the doorway.

Q Yes. A. Of that area, the foyer, and as they stepped out the three of us went in and we there again waited in turn. There are two toilets there.

Q. Now, you testified that when you came out there were people coming in. A. Yes. When we came out -- I don't remember whether -- they can't come in while I come out, if you understand. If you go and look at that room and see what I mean. As I came out --

Q. Well, as I understand your testimony --

MR. HILLAND: Let her finish her answer. I object to his interruption.

THE COURT: Allow the witness to conclude her answer. Proceed.

THE WITNESS: As I opened the door to come out we came -- to

the best of my memory, there were other people there passing in the corridor coming in. We walked out altogether. It was only after we were out that in the passing of a person Betty Ann and Tommy with me
128 that I was able to observe that Tommy was not with me, in a very short distance of time.

Now, I don't know whether there was one person or two persons in addition to my party of two children and myself. I wouldn't be able to say that under oath.

BY MR. ANDERSEN:

Q. But you do have a definite recollection that as you went in some people came out; as you came out some people were going in? A. That is right

Q. And that as you went in you stopped in the doorway of this locker room to let the people out and as you were coming out the people that were going in stopped in the doorway to let you out? A. I cannot testify that I can place anybody in the doorway to let me out.

Q. Didn't you testify to that on direct examination? A. Well, if I did I correct myself because I tell you now: As I went in I know I stepped into the doorway. As I came out we passed people that were coming in; whether they stepped or I stepped, I don't know, but I successfully got to the main corridor where I discovered Tommy was not with me.

Q. Did you -- were you holding Tommy's hand at any time during
129 this? A. I can only assume that I at some time --

Q. I don't want your assumptions. I want the facts and that is all -- A. I am trying to give them to you, Mr. Andersen. No, I cannot swear Tommy was not at any time unattended. I took him to the bathroom because he is an infant or was an infant. I didn't send him.

Q. No, I didn't say -- A. And I brought him out with me. Now, whether I actually had my hand on his -- I presume I didn't if I was in the corridor and he wasn't with me.

Q. Why did you make the remark that you did not send him to the bathroom just now? A. Well, you asked me if I had his hand. I meant

I didn't send him in alone or bring him out or come out minus him. I don't -- I can't tell you that I was holding his hand because if I was he would have been standing with my hand on his.

Q. I see. Then you do not have a situation where he pulled his hand out of your hand and ran away from you? A. Oh, no.

Q. Now, in these pictures you testified that the doors across the corridor, one was open and one was closed. Is that right? A. To the best of my recollection the door in one of the exhibits, however it is
130 marked, showing the panel closed, was in that position the day I went to the bathroom.

Q. Now, do you recall now whether the door leading into the foyer opened out into the corridor or into the foyer? A. It is my recollection that it opens into the foyer, into the area.

Q. And as you go in that door were the hinges on the right or on the left? A. Well, I haven't the picture to look at but it is my recollection that the hinges are on the right and that you reach for the doorknob to open and that it swings up against the blank wall that is there and then you proceed straight ahead to the next door.

Q. Now, as you went into the next door was that a swinging door? A. No, that has a knob on it also.

Q. And did that open in or out? A. I believe that pushes in as you go into the door.

Q. And where would you say the hinges were on that door? A. In the same position, to the right.

Q. And as you went in and came out you have testified that you saw this locker room on the left with this bank of lockers against the wall? A. As I went in I was conscious of that. You see that room as
131 soon as you step into it. You see that before you find out where you are going to the toilet room.

There is no sign on the door where the toilets are. And as you open the door that says women restroom you are in this small area and you have the election to make where the toilets are, and that door is opened and all you could see was cabinets or lockers or whatever they are.

Q. Then the simple answer to the question I asked was that you did see these lockers in that room? A. Yes, Mr. Andersen.

Q. Thank you. A. Yes, sir.

Q. And I think you testified that these lockers were about six feet high? A. That is right.

Q. That was just your estimate. You didn't measure them, did you? A. Well, when you ask me like how tall my child is, you look at something. They went almost to the height of the room. You glance at them and that is how you describe them.

Q. I see. Were these lockers lined up at the time? Were they standing in position? A. They were all standing on one wall across from the doorway, open areaway, where you could see them.

Q. Now, I think you did -- if I am wrong correct me. In the
132 opening statement Mr. Hilland stated that you sent Betty back to get Tommy and I think you changed that, didn't you? A. Yes. I heard Mr. Hilland whenever that was said, yes, sir. There again, I am trying to be perfectly truthful with you. If you were to go with me to where this area is, it is such a short distance that there really was no going back of her alone to get him while I didn't go.

If I said that at any time or gave Mr. Hilland that impression I was mistaken. It was immediate reaction that we didn't have Tommy. We turned. We were together and the crash occurred.

Q. How large is this waiting room where you were waiting? A. Across from the oral surgery room where we were reading magazines and seated?

Q. Yes. A. Well, the doorway opens into the middle of it and there is a small settee, a leather with chrome bar here. There is a window here, wall space, another window, and then to the best of my memory another area where you could sit on the settee. I would judge it to be certainly eight by ten or a nine by twelve rug could go in that room.

133 Q. And that is on the same side of the building as the ladies restroom? A. That is right.

Q. And the locker room? A. Yes.

Q. So that when you went into the ladies restroom, as you went into the room the first room that you would have, would be the waiting room and then the locker room and then the restroom. Is that right?

MR. HILLAND: She didn't call it a waiting room.

THE WITNESS: I don't understand whether we are back in the waiting room -- are you talking about the women restroom?

BY MR. ANDERSEN:

Q. No, I said as you go into the women restroom -- A. That is right.

Q. -- the first room on the left down the corridor would be the waiting room? A. No, that isn't down the corridor. Inside the women restroom that is --

Q. No, I said there is a main entranceway.

MR. ANDERSEN: May I have that first picture?

BY MR. ANDERSEN:

Q. This is 4-A which you at first indicated was the waiting room
134 and then after examination it was determined that this is the corridor and it shows where the waiting room is.

MR. HILLAND: That isn't what she said at all. She never said that was the waiting room.

THE WITNESS: I don't believe I did, sir. If I did you misunderstood me or I misunderstood you.

BY MR. ANDERSEN:

Q. All right It is not important now. The point is this is the corridor and this is the sign to the waiting room. A. That is very plain.

Q. And the waiting room is in back of this door? A. No, it is not in back of that door. It is the human length of your body and another man's body. It is another section of the corridor. It is in no way connected with this door or this room. They are separate.

Q. Yes, that is right. I understand that, but this is the entrance to the waiting room? A. Immediately across from this doorway, not this one, but you can't see the doorway there. It is right adjacent to

that desk, is where the child was being worked on and across this corridor is the waiting room. There is a glass window here in the waiting
135 room where you can look out of and see the other doorway where the child was in another room in an enclosure being worked on.

Q. This sign says waiting room, doesn't it? A. That is correct.

Q. Is that at a door? A. Yes. It is at an entrance way.

Q. It is at an entrance way. Now, my simple question was: Is that the entranceway to the waiting room? A. Yes, sir.

Q. That is all. A. You can see it is.

Q. That is all I asked. A. Oh, I am sorry, sir. I thought you were confusing this room with this one being one and the same doors. I was going in there to a waiting room, I wasn't -- in here I was going to a women restroom. In here I was seated in a chair.

Q. The waiting room is then in back of this door? You go in this door to get in the waiting room? A. Yes, but it is not in back of this door. You go through another double door. You can see there are boxes there. There is a long bench there and there is a glass window and then there is an entranceway which is the entranceway to the waiting room.

136 Q. Is there -- now, you have testified that there was a foyer between the first door leading to the ladies room and the second door leading to the ladies room. A. There is a small area there that is shaped just like this top is. It is three and a half this way; five and a half this way.

Q. Did you measure it? A. I didn't at the time, of course not. We have been back; that afternoon we tried to reconstruct what could have happened when we walked in there.

Q. Did you -- have you measured it or is that just your assumption that it is three and a half by five or whatever it is? A. I have heard my husband say those dimensions and I imagine he made them.

Q. You imagine them but you don't know of your own personal knowledge? A. I don't know from a yardstick but I have been back there numerous times to look at it and I know from that.

Q. Yes. A. Like I say, approximately a nine by twelve rug --

Q. Now, was there that same sort of condition between this door and the waiting room? A. That door to the waiting room is open. What kind of a door it is, I don't know, but it is opened all the way. It is
137 swung back. It stays open apparently because there is an open passageway for calling the children for the appointments; parents coming in and out.

Q. Well, now, Mrs. -- A. And it is not the same door. You see, you go in that door and you are standing in a room. There is no foyer in the waiting room.

Q. Now, Mrs. Healy, you are an intelligent person and I think you can answer the question without going all around the barn. Now, I asked you the simple question: Was there a foyer in back of this door before you go into the waiting room similar to --

THE COURT: May the Court interrupt? The Court is in somewhat the same position as the jury in hearing this testimony without having any photograph before it. I know counsel is very skillful and trained counsel. I am not criticizing but it does seem to the Court that it may be confusing to the jury if counsel refers to "this door" and "this door" without any information on the part of the Court and, I assume, the jury as to what you mean by "this door".

I may not be properly stating the attitude of the jury but I am certainly stating the attitude of the Court and I think they might have the same mental reaction.

138 MR. ANDERSEN: If the Court please, I appreciate the Court's position and I appreciate the jury's position, and I think it is our responsibility as officers of this court to bring out the evidence in such a way that it is understandable.

Now, we went through this order yesterday with these pictures and we talked about doors and we talked about this and that and we passed it to the jurors and I am sure that the jurors couldn't understand it.

THE COURT: May I interrupt you, please? Without intending to

take you off of your course, the Court's suggestion would be that if you wish to examine, and this is just a suggestion, you may conduct your examination as you see fit, of course, but it does seem to the Court that it might be of assistance to the jury and it certainly would be to the Court as an individual - not as a judge, on any legal proposition - if you would have the witness stand before the jury and you would point to the door to which you refer in your questions so that the jury might see what door you are speaking of.

MR. ANDERSEN: Thank you.

THE COURT: I will ask the jury to indicate by nods. Does that make sense to the jury? It seems that it does.

MR. ANDERSEN: I think it is a very good suggestion. What I had planned to do was to get the facts and then explain it on the facts.

139 BY MR. ANDERSEN:

Q. Now, if you step down here we will get this worked out if we can. A. We can draw it maybe on the blackboard.

(The witness stood before the jury box.)

Q. This is the entrance or this is the corridor that you came down and this is the desk that you stopped at. Is that right? A. That is correct.

Q. And then James went in here? A. That is right.

Q. For his work and you went across here to the waiting room? A. Not down here, sir. I went across there.

Q. Well, I am sorry. I can't put my pencil in the picture, but this is the waiting room? A. That is right, sir.

Q. And that is what I am speaking about, is the waiting room? A. That is right.

MR. HILLAND: Mrs. Healy, will you stand this way a little more?

140 BY MR. ANDERSEN:

Q. I didn't say anything about the restroom yet. You went in this way to the waiting room? A. That is correct.

Q. And that is where you waited for forty-five minutes? A. Approximately.

Q. Before you went to the ladies restroom? A. A half hour or something like that.

Q. And then you went into the ladies room up here? A. Came out of this door and came down the corridor and through a partially closed door, down and opened the door here into the womens restroom.

Q. Now, you testified that this represents the scene at the time in 1951. Is that right? A. Yes.

Q. As you remembered it? A. Well, now, Mr. Andersen, I can't say 1951 it would be --

Q. Now, the boxes play no part in this litigation, do they? A. No.

Q. Has anybody said anything about the boxes? A. Well, you asked me, I believe, Mr. Andersen, if I could say that this picture indi-
141 cated the scene as it was in 1951. So I was trying to be helpful.

Q. I see. A. The corridor is the same. The oral surgery sign and those doors are the same. This sign is the same. This sign is the same. The doorways haven't been reconstructed. The desk is still there.

Q. The doorways have not been reconstructed? Is that what you are saying? A. Well, there are still two doorways there and there is still a doorway to the bathroom. Now, I don't live at Georgetown. Whether they have taken them down or put them up -- I mean, the physical appearances are one and the same.

Q. I don't want to keep you standing here. But now the question that I asked up there was whether there was a foyer between this door which is the waiting room door and the waiting room similar to the foyer, between this door and the waiting room. A. No, there is not.

Q. There is not. A. As you enter that room you are standing in the room.

Q. And then you testified that this waiting room, the door to this waiting room was in the middle of the waiting room? A That is the best of my -- when I say "middle", you go in that room and there are
142 chairs back here, a settee. There are windows straight ahead and then there was some other furniture equipment at the other end.

So it was like the room was divided in half, but the doorway came in --

Q. And then this is the locker room back here? A. You can see this door standing open but this door when closed shows this door, closed, which says women restroom. As you open this door this areaway is open and then straight ahead there is a closed door that is a plain door.

Q. And the locker room is on the left? A. As you enter that room the locker -- the doorway is right to your left.

Q. The locker room is on the left as you go into the -- A. If that is what it is, the locker room. That is where the lockers were.

Q. I see and then the other question that I asked was: That the waiting room was on the left side as you went in so that both of these rooms are on the left side as you enter? A Well, as I come into the oral surgery department both rooms are on my right. As I leave the waiting room to come back out the bathroom and the waiting room are on my left. Do you understand what I mean? They are not on my left
143 here, looking at the picture. They are on my right.

Q. No. I said, as you go in the ladies room -- A. Yes?

Q. The locker room is on the left -- A. That is correct.

Q. -- and the waiting room is on the left down the corridor? A. Down the corridor but not adjacent to the locker room.

Q. Thank you.

(Thereupon the witness resumed the witness stand.)

And it was one of these doors that was closed, the door by the box that was closed at the time? A. I believe it was, Mr. Andersen.

Q. Now, I think you testified that you went back -- did you go back that night? A. To the best of my memory, Mr. Andersen, after Tommy was admitted to his bedroom and it was later that afternoon, before we returned home, that we went -- I went back with my husband to show him where and what happened He couldn't conceive without going to see what had transpired.

* * * * * *

147 Q. Excuse me. Now, you testified that you went back to the hospital or to the dental clinic that night with your husband to show him where it happened and what happened? A. Yes, sir.

Q. Were you accompanied by anybody from the hospital at that
148 time? A. On one occasion -- if it was that afternoon I cannot swear -- it must have been because I don't remember making a trip with my husband other than then.

Q. And that was that night? A. I mean, immediately after the accident. Somebody there on the second floor, when I showed my husband where it was, informed us of Doctor Rault's position as dean -- if that is the correct title.

Q. You say that they told you that Doctor Rault was dean at that time? Is that what they told you? A. Well, as I say, I am trying to quote whoever the person was on the second floor. Naturally, I came up with my husband. There is a young middle-aged woman there at that time who is grey-haired. I think she is in charge of the employees who clean up and do so forth, you know, around the dental clinic. She, I believe was the one who told us who was in charge of the dental clinic or who we could see about seeing that room.

Q. And you are now testifying that she told you that Doctor Rault was the dean of the dental clinic at that time? Is that what you are -- A. Well, I cannot swear that she said "dean", head of the department
149 or in charge of the dental clinic.

Q. But she told you that Doctor Rault was in charge? A. Yes, and also directed us as to where his office was and we -- I don't remember going to Doctor Rault's office but I remember Doctor Rault joining my husband and we looked -- discussed the accident. He expressed his concern and had been over to the hospital, I believe he said, and thought Tommy was all right. And we went up to the room and at that time Doctor Rault said the door should have been locked and would have it locked. I am trying to reconstruct for you my meeting with Doctor Rault and what his position was.

Q. Yes, I know what you are trying to do, Mrs. Healy. And my

simple question was: Did this woman tell you that Doctor Rault was the head of the dental clinic at that time? Now, you have testified "yes." A. Some woman did. Now, whether it was she or not, I can't swear to it.

Q. You testified "yes". Now, did you then go to Doctor Rault's office? A. I have been to Doctor Rault's office. Now, whether I went that moment to that office, I can't tell you.

Q. Well, that is what I am asking you. It is a simple question.

150 A. Well, I can't tell you.

Q. That is all I am asking you is whether or not you went then to Doctor Rault's office. Now, you have stated that Doctor Rault was with you. Now, when was Doctor Rault with you? A. Well, as I recall -- going back into the dental clinic we went up the steps, and there is a landing there.

Q. Now, when was that? A. I believe it was late the afternoon of the accident, say, in the proximity of 4:30, going on five o'clock, somewhere around there.

Q. And your husband was with you at that time? A. To the best of my recollection, yes.

Q All right. Proceed. A. We were introduced to each other. Doctor Rault expressed his concern.

Q. Now, --

MR. HILLAND: Let her finish. I object to these interruptions, Your Honor.

THE COURT: You may proceed.

THE WITNESS: I am trying to give them whatever it is they want.

THE COURT: Proceed.

BY MR. ANDERSEN:

Q. Did you go into the locker room with Doctor Rault? A. Yes, we went up to that corridor. This same woman came --

151 Q. I asked you -- A. -- with the key.

Q. I asked you did you go into the locker room with Doctor Rault? A. Yes, sir.

Q. And what was the condition of the lockers at the time you were in the locker room with Doctor Rault? A. Well, I presume --

Q. I don't want your presumption. I just want your best recollection of what you remember. A. The lockers were standing.

Q. They were standing. No lockers on the floor? A. No, sir.

Q. Where did you go then? A. We had conversation about the accident.

Q. I said where did you go then? A. We stood in the corridor and spoke.

Q. Outside? A. In the main corridor, immediately outside of this area where the accident occurred.

Q. And then you went, I think you testified, to see Tommy? A. We had already been to see Tommy before I had left the hospital
152 and was leaving to make a trip home when we stopped and inspected this place. Tommy had been situated and admitted and bedded down at the hospital when we went back to this area.

Q. When was it that Doctor Rault visited the child in the hospital? A. I don't know whether he visited or whether he made inquiry. He made some comment at the time about his concern for Tommy; that he had inquired over at the hospital or had been over. I am not sure which he said, but he had certainly looked into what had transpired there in the dental clinic.

Q. But you never did go to see Tommy in the presence of Doctor Rault? A. No. No. No.

MR. ANDERSEN: I have no further questions.

REDIRECT EXAMINATION

BY MR. HILLAND:

Q. Mrs. Healy, what was the conversation that was had between you and your husband and Doctor Rault on the occasion of the afternoon of June 15th when you and your husband went back to the dental clinic?

* * * * * *

153 Q. Will you state the conversation, Mrs. Healy? A. The best of my memory, Doctor Rault expressed his concern for Tommy, his

sorrow that the accident had taken place. My husband asked to see the room and look at it with him, which was done.

Q. I am asking you about the conversation now. What was said, Mrs. Healy? A. Well, Doctor Rault said that he -- when we went up-
154 stairs that he thought the door should have been locked and would be locked, and on another occasion -- well, what was said, that is the end of that.

Q. Have you stated all of the conversation you remember that occurred at that time? A. His concern, his reassurance that he thought everything would be all right. As I said, I think he either had been to the hospital or had inquired at the hospital. There was something in the conversation to indicate that he had full knowledge of his being there and--

Q. Yes, you have been over that. But what I want to know, Mrs. Healy, is have you stated all of the conversation which you remember? A. To the best of my knowledge, the conversation was that the door should have been locked and would be locked. That transpired at that same meeting.

Q. Now, this oral surgery department on the second floor, was that a children's oral surgery department? A. Yes. My child was sent there. I believe they treat adults also.

Q. About how many children did you see in and around that second floor in the waiting room in the hall and in back of the door marked woman restroom? About how many children did you see in and around that second floor in the waiting room in the hall and in back of the door marked woman restroom? About how many children did you see around there that day? A. Upon first arriving and going into that
155 room there were other mothers there and certainly another three or four children besides mine. In the room where Jimmy was being -- three or four children, I say, besides mine. I had two, so maybe there were only two other children. I mean, there were other youngsters. There wasn't a mob of them by any means. That wasn't kindergarten. In the room where Jimmy was when he went in and I saw him go in, I would say there were at least three other children.

Q. Now, about how many times in all have you been to that dental clinic? A. I would say I had certainly been there eight to ten times preceding that.

Q. And on the average how many children would you see in and around that clinic when you were there those eight or ten times? A. Well, the place is swarming with children on the first floor where you wait but you go upstairs to go to the bathroom -- I mean, it is a children's clinic and they are there with parents and they are in numbers, ten, twelve -- not all necessarily patients. I mean, just like I had children with me.

Q. I am just asking you about how many children there were without regard as to whether or not they were patients.

156 MR. HILLAND: That is all.

RECROSS - EXAMINATION

BY MR. ANDERSEN:

Q. Excuse me. You said ten or twelve. What did you mean by that? Ten or twelve children? A. I believe that answer was on preceding trips to the dental clinic when we wait for appointment whether it is a morning appointment or afternoon appointment, how many children are in or about the dental clinic.

Q. That was not --

THE COURT: I think she said she had been at the clinic eight or ten times before.

BY MR. ANDERSEN:

Q. But that was not on this particular day? A. You mean the number of children? No, that wasn't in answer to that day.

Q. And was that at the oral surgery or in the other part? A. The first floor part.

Q. The first floor part? A. On the preceding trips, I was referring to.

Q. Not in oral surgery? A. That is correct. I was referring to the first floor dental clinic where the drilling cavity work is done. Upstairs is extraction.

157 MR. ANDERSEN: No further questions.

MR. HILLAND: I neglected to ask you one question.

REDIRECT EXAMINATION

* * * * * *

BY MR. HILLAND:

Q. * * * What were the relative ages and sizes of the children you would see in and about that dental clinic on the occasions you went there? A. The same range as my children, five years old, four years old, eight years old, ten years old, twelve years old.

* * * * * *

161 JAMES D. HEALY

was called as a witness for and on behalf of the Plaintiffs, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. HILLAND:

Q. Will you please state your full name? A. My name is James D. Healy.

Q. What is your address? A. 4419 Montgomery Avenue, Bethesda, Maryland.

Q. What is your occupation? A. Special agent with the United States Air Force.

Q. Are you the plaintiff in this case? A. I am.

162 Q. Or one of the plaintiffs, rather? A. Yes, I am.

Q. Are you the father of the infant plaintiff, Thomas Patrick Healy? A. I am.

Q And what is your occupation or profession by education? A. My education, I am a graduate of law school.

Q. Of what law school? A. I am a graduate of Columbus University Law School.

Q. Were you formerly a student at Georgetown? A. Yes, I was.

Q. On June 15th, 1951, did you receive a telephone call from Mrs. Healy? A. Yes, I did.

Q. And where were you at that time when you received that call? A. At the time of that call I was at home.

Q. And as a result of that call what did you do? A. I proceeded to Georgetown University Hospital.

* * * * * *

164 Q. Now, after you arrived in his room on June 15th, 1951, the day he was injured, what, if anything, did you do when you left the hospital, his hospital room? A. When I left the hospital room on that

day I proceeded over to the University Dental Clinic with my wife in order to view the location and room where Tommy was injured.

Q. Did you meet anybody there? A. Yes, I did. As we reached the top of the steps I recall that the dean of the school, Doctor Rault --

Q. Keep your voice up, please. A. Doctor Rault joined us and I asked him if I could see the room where the incident occurred and I was taken to the room. At that point the room itself was not accessible,

165 I believe. As I recall, it had been locked and someone came with a key, opened the door and we viewed all the premises that have been discussed here.

Q. Did you ever take any measurements of any of the areas back of or within the enclosure made by the door to -- the door on which is marked "womens restroom"? A. Back of the door marked womens restroom, yes, I did.

Q. What measurements did you make? A. I measured the immediate vestibule in that area.

Q. And -- A. Which measured -- the immediate foyer, as you proceed through the door from the corridor which measured three feet, five inches in length or however you want to say it, and five feet, five inches in width.

Q. Well, which do you describe as the length? A. Well, I describe the length as that part which runs parallel with the hallway.

Q. It runs parallel with the hallway? A. With the hallway.

Q. And that was what? A. That was three feet, five inches.

Q. And the other way it was what? A. I am sorry. I will have to -- I am wrong on that. If I may correct myself: Describing that as the length with that part which runs parallel with the corridor was five feet,

166 five inches.

The part which runs at a curvature at a right angle with the corridor was three feet, five inches.

Q. In other words, straight ahead of you was three feet, five inches? A. That is right.

Q. And the length right and left was five feet, five inches?

A. Five feet, five inches.

Q. Did you make any measurements of the lockers, the steel lockers, involved? A. Yes, I did.

Q. And what was their height? A. Their overall height was approximately six feet, six and one eighth or seven eighth inches.

Q. And were they in single units or multiple units? A. They were multiple lockers consisting of one unit -- there were three lockers in each unit. The lockers had been welded or bolted -- I should say bolted together so as to form one unit and three lockers formed one unit.

Q. And you remember how many units of three lockers there were in that room? A. Yes. There were three units of three lockers.

Q. And the material of which those lockers were made was what?

167 A. They were metal lockers.

Q. And how were they painted? A. They were painted green.

Q. Did you examine them to determine whether or not they were in any way bolted or fastened to either the floor or the wall? A. Yes, I did.

Q. What did you find? A. Of the three lockers on the particular day of the accident on June 15th, I pulled the one unit of lockers as you immediately went through the door and the ones which I understood that were particularly on top of Tommy when he was hurt, I pulled those just as if to open the door to get into one of the lockers and found that all three of them came over on me and I reached up and I pushed them back onto the wall.

I looked at the holes. I looked to see whether there was anything to affix the lockers to the wall and there were holes both in the legs going down into the floor in which screws could have been placed, and there were holes in the back of the lockers, as I recall, in which screws could have been placed into the wall itself.

However, there were no screws in the lockers at the time.

Q. They were not fastened in any way in the wall or the floor?

168 A. No, they were not.

Q. Did you observe the condition of the floor on which the lockers stood? A. Yes, I did. Where the floor joins the wall against

which the lockers were placed in an up-right position there is a slight rise. It is not a large rise or hardly even a noticeable rise. That is from a distance, but there is a different color in the floor right there then.

To explain it a little better: There is a baseboard which was of a dark color and there was some kind of linoleum perhaps like the black -- about like the dark spot on this floor here where they came together. On looking close you could see there is a slight rise upwards on which the back legs of the lockers rested.

Q. And what was the effect of that on the lockers? A. Well, I can't say as to what the effect was.

Q. I mean, as to the position of the lockers it would be -- it would give the effect if all four legs were on the floor evenly of making --

MR. ANDERSEN: If the Court please, I think he is getting into some opinion testimony at this point and I would object to it.

THE COURT: Just testify to what you saw.

MR. HILLAND: That is all I want, Mr. Healy, what you

169 actually saw.

BY MR. HILLAND:

Q. How did it make the lockers -- how did that condition of the floor make the lockers stand? A. To me they leaned a fraction forwards at the top.

* * * * * *

187 Q. When you went back to -- strike that.

When you went to the scene of Tommy's injury with Mrs. Healy on the afternoon of the day he was injured and met Doctor Rault, did you have a conversation with Doctor Rault? A. Yes, I did.

Q. And what was the conversation? A. When I first met Doctor Rault after we had introduced ourselves, I asked to see the room where the incident happened. He said that he would get a key. I think the key was brought. He -- I don't recall specifically what he said other than on one occasion when he did mention to me that he was sorry that my son had been injured and that the room where the injury took place in the womens restroom, there, should have been locked and would be

locked in the future.

Q. Now, I show you Plaintiffs' Exhibit No. 4-C and ask you if you took that picture? A. Yes, I did.

188 Q. Now, are you familiar with the location of the door with the words women restroom written on it? A. Yes, I am.

Q. Now, when that door is closed what area or areas are within the enclosure made by the closing of that door?

In other words, what is back of the door when it is closed? A. When that door is closed the restroom is immediately behind it which you enter through another door and it is slightly, slightly to the left as you go through the foyer into the -- sharp left there is another door which enters into another area where the lockers were where Tommy was hurt.

Q. And what else is there behind that area, behind that door? A. There is nothing else other than the foyer itself.

Q. Did you take any measurements of the room in which the lockers were? A. Yes, I did.

Q. And what is the size of that room? A. The size of that room is approximately nine and a half feet by twelve or by eleven and a half feet.

Q. Nine and a half by twelve? A. By twelve approximately, yes.

Q. And the eleven is what? A. Well, no. I corrected myself to

189 say that it is approximately nine and a half by eleven and a half.

* * * * * *

195 CROSS EXAMINATION

BY MR. ANDERSEN:

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209 MR. ANDERSEN: If the court please, I make a motion

210 at this time or I move for a directed verdict on the ground that the plaintiff has failed to prove any negligence whatsoever on the part of the defendant, Georgetown College; that they have failed to prove the cause of the accident, the intervening cause.

They have failed to show exactly what happened except that the

locker fell on a child. There is no evidence whatsoever to show why it fell or what caused it to fall. If the jury were to have the case at this juncture they would be subject to speculation as to exactly what happened.

The plaintiffs have failed to show that the lockers were an attractive nuisance or that they could be legally held to be an attractive nuisance by the Court. But even if they did it would be another prerequisite to show that the child went where he did because of this attraction.

I respectfully submit that the plaintiff has failed to show this and that the directed verdict should be granted.

THE COURT: Well, the Court has given a good deal of consideration to it and has concluded that these questions present sufficient questions of fact to justify the submission of the case to the jury, unless, of course, it is urged that there is additional evidence which would change the Court's view.

So the Court will overrule the motion at this time.

MR. ANDERSEN: I would like to add that the plaintiff
211 has rested his case.

THE COURT: Yes.

MR. ANDERSEN: And I don't think that it is proper for the Court to have any reservation about the possibility of additional evidence sustaining the plaintiffs' case and thereby making it eligible for consideration by the jury.

I think the point is right now, --

THE COURT: The Court will -- you may finish.

MR. ANDERSEN: Excuse me.

THE COURT: No, you may finish. I interrupted you.

MR. ANDERSEN: I have forgotten my trend of thought but what I was going to say, I think, was that the status of the case right now, that is what is in question.

THE COURT: Yes. The Court appreciates that and the Court is ruling as of now, of course. What the Court stated, I might say, is obiter dictum, but it is permissible for counsel for the defendant to renew his motion at the close of all the testimony.

It is not unheard of but the motion could be sustained at the close of all the testimony. The Court is not indicating anything about sustaining a motion in this case at any time, but it is in support of the Court's position as to the reason why I made that statement.

The statement has no bearing on anything at this time because there is only one thing before the Court at this time and that is the question
212 as to whether the motion now made at the close of the plaintiffs' testimony should or should not be sustained, or, whether it should be sustained or overruled, and the Court has stated that at this stage of the proceedings or at this posture the Court is persuaded that the motion should be overruled and the motion is overruled.

If you wish to have the Court withdraw the remainder of its statement, the Court will withdraw that statement from the record.

MR. ANDERSEN: No, I am just interested in knowing -- do I understand by that ruling that we may renew the motion at the end of the defendant's case?

THE COURT: Well, that is your privilege at any time, to make a motion at the close of all the testimony.

MR. ANDERSEN: I see.

THE COURT: And, in fact, I think it is quite the custom to do it. It used to be the rule that if you didn't do it you waived your motion at the end of plaintiffs' testimony. I don't think that rule still obtains.

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214 J. ROBERT BROWN

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSEN:

Q. Mr. Brown, would you please state your full name and address to the Court and jury and speak up so everyone can hear you.

A. J. Robert Brown, 4010 Glenridge Street, Kensington, Maryland.

Q. And what is your occupation, Mr. Brown? A. I am assistant director of research for the commission on Government security.

Q. And do you know James or Thomas Patrick Healy? A. Yes, sir.

Q. And you know his father, James -- A. Yes, sir.

Q. -- Healy? A. Yes, sir, I do.

Q. And his mother? A. I have met her, yes, sir.

215 Q. And do you know the family? A. Yes, sir.

Q. And how long have you known this family? A. Since approximately 1949.

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222 CROSS EXAMINATION

BY MR. HILLAND:

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237 Q. And when have you last seen Tommy? A. When have I last seen or when had I?

Q. When had you at that time? A. The last time I saw Tommy was in my own house.

Q. When was that? A. That is what I am trying to fix, sir. I believe that was -- I am trying to fix in my mind, sir, whether it was before the accident or after the accident.

My recollection at the moment is that it was after the

238 accident. Mr. Healy came to my house to see if he could borrow some -- a paper, a legal paper for guidance in some work he was doing.

I did not have the paper.

Q. Did you talk with Tommy on that occasion when you saw him? A. Yes, sir.

Q. Did you look at him? A. Yes, sir.

Q. Did he have any scar on the back of his head when you saw him on that occasion? A. Not observable, sir.

Q. Not observable? A. No.

Q. Did you examine the back of his head? A. No, sir.

Q. And you didn't see any scar on the back of his head?

A. No, sir. Now, I want to save my testimony --

Q. What I am trying to get at, Mr. Brown, is on what did you base your statement that you just made that he had no observable scar on the back of his head. A. That I didn't observe any.

MR. HILLAND: Will you bring Tommy in, please?

THE WITNESS: But counsel --

239 BY MR. HILLAND:

Q. You just wait a minute. I will ask you the next question.

MR. HILLAND: Can your Honor indulge us just a minute?

THE COURT: Could you continue?

MR. HILLAND: I would prefer not to, if your Honor please. I am afraid that it would break up the examination.

THE COURT: Very well.

MR. ANDERSEN: If the Court please, while we are waiting I would like to have the record show that Mrs. Healy has been sitting in the courtroom since she has testified and that during the testimony of Mr. Brown she did approach counsel with a note.

I would just like to have the record show that.

THE COURT: The record may so show.

MR. HILLAND: I would like to have the record show that there is nothing wrong with that, your Honor.

THE COURT: The record will indicate both statements of counsel.

MR. HILLAND: May I say I don't know where counsel would get information if they didn't get it from this boy's mother and father.

THE COURT: That may go in the record.

(Thereupon an individual entered the courtroom and approached

240 Mr. Hilland.)

BY MR. HILLAND:

Q. Mr. Brown, I want you to examine the back of Tommy's head. Suppose you step up right here. Can you step over here, Mr. Brown? A. Yes, sir.

(Thereupon the witness approached Mr. Hilland.)

MR. ANDERSEN: If the Court please, --

MR. HILLAND: Stand to the side so the jury can see.

THE COURT: Just a moment.

MR. ANDERSEN: Wait a minute, Mr. Hilland.

I am constrained to object to this because the plaintiff has rested and this child has never been identified as Thomas Healy. Maybe he is, I don't know. But he has never been identified.

The plaintiff has not included this child in its testimony and this goes right back to the purport of my motion after the plaintiff rested, and I think it is highly irregular at this point.

MR. HILLAND: Well, I will ask the witness.

BY MR. HILLAND:

Q. Mr. Brown, do you know this boy?

MR. ANDERSEN: I object, if the Court please. It is not
241 within the scope of the direct examination.

MR. HILLAND: I will make him my witness for the purpose of asking that question.

MR. ANDERSEN: The plaintiff has closed, if the Court please.

THE COURT: The Court will permit the witness to answer the question.

BY MR. HILLAND:

Q. Do you know this boy, Mr. Brown? A. Yes, I recognize him.

Q. All right. Will you step over here and stand on the side so the jurors can see the back of his head? Stand over here. A. I can't see it over here.

Q. All right. Stand over here then.

When you saw Tommy the last time did he have this scar on the back of his head? A. He could have had, sir.

Q. Well, I ask you did he have it when you last saw him?

A. I don't know, sir.

* * * * * *

242 A. The last time Mr. Healy visited us this is not the boy who came with Mr. Healy.

Q. This is not the boy? A. That is right.

Q. So that you didn't see this boy on the occasion that you have testified to a little while ago? A. That is right, sir. I thought it was Tommy. That was not Tommy.

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268 FREDERIC G. BURKE

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSEN:

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269 Q. Now, would you please tell the Court and the jury what you found, the history that was given and the results of that examination?

MR. HILLAND: Just a minute. Your Honor, I object to

270 any history. He was only an examining physician and, as I understand the rule, it is that only a treating physician is permitted to repeat history -- not an examining physician.

THE COURT: Oh, I think that it is necessary to recite something of the background of the patient in order to enable the witness to give an opinion as to what he ascertains.

MR. HILLAND: Well, I think that is true in the case of a doctor who has treated and the rule is, as I understand the rule, your Honor, limited to the doctor who has obtained the history for purposes of treating the patient who can state the history -- not a mere examining physician.

THE COURT: I will overrule the objection. Counsel may proceed.

* * * * * *

271 A. Mrs. Healy told me that the child had always been clumsy, hyperactive, and was always getting into trouble, as far as several --

referring to several accidents and instances that had occurred with this youngster all his life.

Thomas had had a negative medical history except for an attack of measles between the ages of two and three, and but that except for these repeated series of accidents which she went into in some detail,

272 he had actually been a pretty healthy young boy. He had always had, in a medical line, an occasional attack of tonsillitis.

The fall which occurred, the accident which occurred in the Georgetown Dental Clinic at about the age of three and a half was related, indicating that the child had suffered this accident and a scar was present measuring approximately two and a half inches, I believe, in the occipant of the child's head and he had several other scratches and marks of previous injuries around the face and head, as I recall.

Further, in the history line, his hyperactive behavior was rather characteristic right through the whole period and before going to school and since that time. A recent note the mother made was that the Sister in school had requested that the child take his lunch at home although I believe he lives close by the school and had been taking lunch at the school, but she felt that it might be a little less disturbing if he did have his lunch at school -- I mean, at home rather than in the school facility.

He is extremely mischievous, a very well liked little boy, a very -- but was always getting into some type of trouble by virtue of his adventureness. At this time she, Mrs. Healy, also mentioned that this child was having penile erections particularly in the morning although from time to time -- well, constantly after being asleep.

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311 GUSTAV O. KRUGER

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSEN:

Q. Doctor, will you please state your full name and occupation to the Court and jury? A. Gustav O. Kruger, Junior Professor of oral Surgery, Georgetown University School of Dentistry.

* * * * * *

321 Q. Now, Doctor, are you familiar with the locker room in your department? A. Well, there is no locker room in our department.

Q. There is nolocker room in your department? A. No.

Q. Are there any lockers in the vicinity of your department?

322 A. Well, half way down the hall there are some lockers.

Q. And do you know who used those locker rooms, who -- A. Yes.

MR. HILLAND: I object to that as being irrelevant and immaterial, your Honor.

THE COURT: Oh, he may answer that.

THE WITNESS: The women medical students use those lockers. They have a separate room there that they use.

BY MR. ANDERSEN:

Q. Your department is in association with the medical school? A. Well, actually we have a separate wing. The medical and dental schools are under the same roof but our wing is pretty much by itself.

Q. I see. Now, where do patients wait or do you have provision for patients when they come to your department? A. Yes, we have a separate waiting room. The first room as the department is approached is a separate waiting room.

Q. And what are the regulations in your department with reference to the use of the waiting room? A. Well, we have to keep them in there. We ask that all people who come with patients, whatever their relationship, to stay in that room.

* * * * * *

324 CROSS EXAMINATION

BY MR. HILLAND:

Q. Well, Doctor Kruger, when you said, Doctor, that these doors, referring to these doors and wall, were not there in June, 1951,

you were referring to these two doors, one of which is marked "oral surgery"? A. Yes.

325 Q. And the partition, that partition above that and to the side was not there? A. That is right.

Q. Now, this door where the word "ladies" appears over it was there in June 1951, was it not? A. Yes, to the best of my knowledge.

Q. So that the only difference then was that that was all one straight wall down there? A. One straight corridor.

Q. Straight corridor? A. Yes.

Q. Yes, without the doors that would make the division that it is possible to make -- A. That is right.

Q. -- now with those doors? A. That is right.

Q. The waiting room was right down there where it is marked waiting room, was it not? A. Yes.

Q That is the room across from the oral surgery room where Jimmy Healy was? A. No. Jimmy was being done at the end of that hall.

Q. At the end of that hall? A. At the end of that hall.

Q. But this is the room where you said you asked patients and

326 other persons who were there -- A. That is right.

Q. --- to wait while their friends or relatives were being served? A. That is right.

Q. Now, in that room where the words waiting room are over it, that room in there doesn't have any or -- strike that.

In June, 1951, it did not have any toilet facilities, did it?

A. That is right.

Q. And the toilet facilities provided for persons who were waiting in that room were the toilet facilities up here marked "ladies"?

A. For ladies, yes.

Q. For the ladies who were waiting in the waiting room?

A. That is right.

Q. Or children with them? A. Well, we -- there is a men's toilet, we will put it that way.

Q. Yes, for little children who were with their mothers, that was also the facilities provided. Isn't that correct? A. Yes.

Q. Now, have you ever been in the areas that are behind the
327 door marked "ladies" there -- A. Yes.

Q. -- when it is closed? A. Yes.

Q. And you are familiar with what the areas are in there? A. (The witness nodded affirmatively.)

Q. Now, when that door -- there is a door, is there not or was there not a door -- A. I believe there are three doors in that vestibule.

Q. Yes, but the one from the main corridor has women restroom written on it, does it not? A. This is the main corridor which is a solid door.

Q. No, this one with that door or that room -- that picture, the evidence is, Doctor Kruger, was taken from in the room where the lockers were and the door into the women's restroom was opened against the back wall there. A. Oh, I see. I see.

Q. Now, do you remember that that door into this entrance which I pointed to in Plaintiffs' Exhibit No. 4-A, the door to that entrance right there on the right has painted on it the words women restroom? A. I, I don't recall.

Q You don't recall that? A. I don't recall that. I know that there is one in there and I think I am oriented but I don't go in there.

328 Q. But you say you have been in there? A. Yes. After the accident we looked in. That was the first time, as a matter of fact, that I had been in there.

Q. The first time that you had ever been in there? A. Yes.

Q. Now, immediately inside that door when it is opened as it is in this position there is a small foyer, is there not? A. Yes.

Q. And then over on the -- to the extreme left of that door there is a door that goes into the room where the lockers were. Isn't that correct? A. Yes.

Q. And immediately next to that and at right angles to it but immediately next to it is the door that goes into the toilet facilities.

Isn't that right? In other words, you have a corner of that foyer and on this wall is the door into the locker room and on this wall immediately next to it is the door into the toilet facilities? A. Well, I am not oriented on -- from your positioning there.

Q. Well, can you describe it? A. Well, couldn't the superintendent
329 do that, the superintendent of the building? He knows more about those doors.

Q. All right. You are simply not familiar with it? A. I have been in there but I don't think my testimony would be --

Q. And the first time you were ever in it was on the occasion that Tommy Healy was injured on June 15th, 1951? A. Well, it was after that.

Q. It was after that? A. Yes.

Q. He wasn't in that room when you went in it on that occasion? A. Well, I went in that evening or the next day.

Q. Were the lockers when you went in, had they been raised and put back up against the wall or were they still on the floor? A. I, I can't remember ever seeing the lockers on the floor so they must have been put up.

Q. Do you know what the dimensions of that room are where the lockers were? A. No.

Q Do you know the dimensions of the little foyer? A. No, I don't.

Q. When that door is closed the areas behind it and enclosed by
330 it consist of the foyer, the room in which the lockers are and the room in which the toilet facilities are. Isn't that correct? A. Yes.

Q. And I believe you have already said, did you not, that in this room marked waiting room there are no toilet facilities? A. That is right.

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331 **GLENDON H. SOUVINEY**

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Deputy Clerk, assumed the witness

stand and testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSEN:

Q. Mr. Souviney, will you please state your name and address to the Court and jury and speak up so the last man in the jury can hear you? A. Glendon H. Souviney, 4109 W Street, Washington, D. C., Northwest.

Q What is your occupation? * * *

THE WITNESS: Glendon, G-l-e-n-d-o-n H. Souviney, S-o-u-v as in Victor- i-n-e-y. V as in Victor-i-n-e-y.

THE COURT: Thank you.

BY MR. ANDERSEN:

Q. And what is your present occupation? A. I am retired from the United States Army.

332 THE COURT: Will you please keep your voice up so that all of the ladies and gentlemen of the jury can hear you and all of counsel?

BY MR. ANDERSEN:

Q. And speak just as distincly as you can, Mr. Souviney. Calling your attention to the 15th of June, 1951, what were you doing at that time? A. I was on ROTC duty at Georgetown University Dental School at that time.

Q Were you employed by the University? A. No, sir.

Q. What branch of the service were you with? A. I was with the Medical Department, United States Army.

Q. Medical Department, United States Army? A. Yes, sir.

Q. And it is from that department that you are now retired? Is that right? A. Yes, sir.

Q. Now, referring again to the date of 15 June 1951 did anything unusual happen at the dental clinic? A. Well, there was this accident.

Q. And that is the accident that this case is about? A. Yes, sir.

333 Q. Did you have any personal knowledge of the circumstances surrounding this accident? A. What do you mean, sir?

Q. Do you have any personal knowledge of the events that occurred --

A. Yes, sir.

Q. -- on the 15th of June 1951? A. Yes, sir.

Q. Will you tell the Court and jury what you know about this accident? First of all identify the location of your office in the dental clinic, if you can. A. Well, the ROTC office was right across the hall from the, from the ladies locker room. It was diagonally across and I could look directly into the locker room from my office.

Q. Now, will you tell the Court and jury what happened? A. Well, at the time it was two children racing up and down the hallway. They were yelling and chasing each other. And I was trying to type up some papers on my job, and the noise and everything kind of disrupted me and at the same time I heard somebody,a female voice, holler to the children to quiet down and sit still.

Well, I, in the meantime, I had to get up from where I was typing
334 and went into my little reception room in the back of my office to have some coffee, kind of relax, and it was quiet all of a sudden out in the hallway where the children were running around.

And the next thing I heard was this metal banging, and it sounded, it sounded just like the wall lockers.

MR. HILLAND: Sounded like what? I can't hear you.

THE WITNESS: Like wall lockers, steel wall lockers, metal against metal. And then --

BY MR. ANDERSEN:

Q. You say it sounded like that? A. Yes, sir. I had heard that before.

Q. All right. A. And the next thing I heard was the loud metallic crash and the child scream. The crash and the scream came about the same time together and I knew what happened in my mind. I knew one of the lockers had fallen over but I didn't know the child was under it at the time.

MR. HILLAND: I can't hear you when you drop your voice. You knew one of the lockers had what?

THE WITNESS: Must have fallen over. That is what was

going through my mind at the time. And, of course, I run right out and I could look in from my office at a diagonal direction and I could see the locker on the floor.

335 Well, I run in and I didn't know the child was under there at the time but when I got in there there was a lady had lifted the locker part way off the boy, and I grabbed ahold of it with my left hand and lifted it up and grabbed the boy by the feet and pulled him out. And it had hit right across the back of his skull. And I noticed he was bleeding. He was still crying.

BY MR. ANDERSEN:

Q. Then what? A. And after I dragged him out I picked him up face down and tried to use my own medical knowledge on that, not to turn the child around or to move him too much. I picked him up and carried him into the surgery where they had a bunk in there and I laid him on that face down. And while I was lifing the locker the door swung down and it kind of braced --

MR. HILLAND: It did what?

THE WITNESS: It braced the lockers up. The locker door was open. It had fallen open and fallen to the right. And after I had pulled the child out I dropped the locker -- pulled him out from under it, I dropped the locker and picked the child up face down and carried him in and put him on the bunk.

BY MR. ANDERSEN:

Q. Now, is that all you know about this incident? A. That is all.

336 MR. ANDERSEN: I have no further questions.

CROSS EXAMINATION

BY MR. HILLAND:

Q When you heard that noise like metal against metal, you said you knew in your own mind that one of the lockers had fallen over. Had you seen those lockers prior to that time? A. Yes, sir, I had seen them in there right along.

Q. What? A. Yes, sir, I had seen them in there right along.

Q. Had you ever been in the room where they were before that time?

A. I think I had been in there once. I am not sure.

Q. You knew they were not fastened to the wall or floor? A. That is right, sir.

Q. And it was enough for you to merely hear that noise to know that it was a locker that had fallen in that room? A. Yes, sir, the sound came from there.

Q. Now, those lockers were fastened together in sections of three, were they not? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. Do you know about how heavy a section of those lockers,
337 section of three, was? A. That I don't know, sir.

Q. They were made of steel, were they not? A. They were a metal. I don't know whether they were steel or not, sir.

Q. You remember how tall they were? A. Oh, about six foot. I can't say.

Q. Have you -- do you remember what was painted on the outer door leading into the area where that locker room was? A. No.

Q. Do you remember seeing these words women restroom painted on that door when it was closed? A. (There was no audible response.)

Q. In that picture the door is open. And that picture has been taken from within the locker room while that door is opened against the foyer wall. A. I probably seen it.

Q. Do you remember this word, ladies, over the door? A. Yes, sir.

Q. And in that opening where the word ladies appears there there was a door that closed that opening, was there not? A. What the--

Q. Into the women's restroom. A. To both rooms?
338 Q. Yes, and closed the whole business. A. Closed the whole business? Yes, sir, I think there was.

Q. Yes, sir. And so that when this door marked women's rest-room was closed the areas in there consisted of a small hall or foyer, did they not? A. Yes, sir.

Q. And a room in which the lockers were and immediately next

to that was a door to a room in which the toilet facilities were. Isn't that correct? A. Yes, sir.

Q. And would you say that the foyer or small hallway was about three and a half feet by five and a half feet in size? A. I don't know the exact measurements.

Q. Does that seem about right to you? A. It seems about right, I would say.

Q. Do you remember what were the dimensions of the room in which the lockers were? A. No, sir, I don't.

Q. Do you remember that when the lockers were down that they pretty well filled up that room? A. It had fell towards the door.

Q Yes, and didn't it come practically to the door? A. It didn't fill in there, no, sir. I could get in.

339 Q. Didn't fill in the door but practically to the door, did it not? A. It was about, I would say, two or three feet. Had enough room for me to move around in there and pull that child up.

Q. When you first came in the child was so far under the lockers you couldn't see him? A. No, sir.

Q. Do you know how many lockers were on him? A. Two of them.

Q. Two of them? A. The locker was laying down towards the door, the top. His feet were at an angle. It looked like he started to run as the lockers fell. Now, that is the way I figure it. He started to run away. The top of the locker caught him as he was running, because his feet were at an angle where it looked like he almost got clear when it hit him.

Q. And when you say two had fallen on him they were in sections of three, were they not? A. In sections of three, yes, sir.

Q. But two of them were over him? A. Yes, sir. The second one, his head was lying under the second one and that locker was opened. The door was laying flush up against the other door.

340 Q. And how many sections had fallen, if you remember? A. Just the section of three lockers.

Q. Just one section of three lockers? A. Yes, sir.

Q. Now, after you pulled the boy out what did you do with him? A. Well, I picked him up, slid my arms underneath his, one under his shoulders, and I held on to his face to try to -- with my thumb, to keep his head up, not to let it hang. He was, he was conscious and he was crying, whimpering like, and I had my other arm, my left hand, under his hips and legs, and carried him, face down, carried him across the hall into the operative -- where they have the bunks and laid him on the bunk face down. In the meantime the nurse and the doctor came in. I had blood all over my uniform.

Q. In which direction was the boy's feet when you picked him up? A. His feet -- they were sticking out from under at an angle out from the top of the wall -- what is here. And he was laying at an angle kind of and his feet were almost clear of it, of this first locker, the first section.

Q. Did that indicate which way he was facing when the lockers fell? A. Well, it looked like he started to run and the locker hit him
341 before he could get away.

Q. Now, after you brought him out into the -- I believe you said some kind of a cot was it, or bunk? A. It was a bunk, yes, sir.

Q. What did you do then? A. Well, I went into wash the blood off my uniform. I had a brand new gabardine uniform and I had to get the blood out of it.

Q. And then what did you do? A. Sir?

Q. Then what did you do? A. Well, I went in and proceeded with my work because the doctors had taken over then.

Q. You didn't know this boy who was injured before that occasion, did you? A. No, sir.

Q. Now, when you heard children out in the corridor running up and down the hallway, did you go out in the hallway? A. No, sir, I didn't.

Q. Sir? A. No, sir, I didn't.

Q. So you didn't see the children who were running up and down the hallway? A. No, sir, I didn't. I know there was two. They were

chasing each other.

342 Q. Sir? A. They were chasing each other. They were going past the door, running back and forth.

Q. And that disrupted your work so you went back in some other area, did you say? A. I went back into a little alcove I use as a little storeroom and I had my coffee pot back there and I was getting a cup of coffee.

Q. And that is where you were when you heard this noise? A. Yes, sir. I could look right into the -- into that room. From that little office it is right at a direct angle into that room.

Q. When you got in there -- strike that. When you were looking in there from where you were, did you see the lady in there? A. No, sir.

Q. You couldn't see her until you got in there. Is that it? A. That is right. She was around the corner lifting, trying to lift the locker up.

Q. You didn't see her go in there, did you? A. No, sir, I did not.

Q. Sir? A. No, sir, I did not.

Q. So that between the time that the crash occurred and the time
343 you got out where you could see the locker room she was already in there? A. Yes, sir.

Q. Did you see anybody else in the locker room when you came in other than the lady and the little boy you pulled out from under the lockers? A. No, sir. I was more interested in getting that boy out.

Q. Did you help to remove him to the hospital? A. No, sir, I did not.

Q. In other words, you told us about all of your part -- A. Yes, sir.

Q. -- in this affair? After you laid him on the bunk in surgery how long did you remain in there? A. Oh, it wasn't any time at all, because one of the doctors had come in and there was plenty of people around so I didn't have to stay in there.

Q. The lady who was lifting the lockers, had she lifted the weight

of them clear off the boy or did you have to help lift, too? A. Well, she had lifted it off his body. She just got it clear and they were heavy enough where I don't think she could have lifted it any higher, and I used my left hand to lift it up and the door swung down to brace it. As
344 soon as I got the boy out, I left it and I dropped the locker. I don't know what happened after that. I just got the boy out of there.

Q. When you said the boy's legs were sticking out, were they sticking out from under the top part of the lockers or a side part? A. The side part. They weren't sticking way out. They were just -- I would say his toes were kind of out. You know, he was laying flat on his face.

Q. And he was face downward? A. Face downward, yes, sir.

Q. And his body was, too? A. Yes, sir, laying kind of on this side, mostly on this side; not over on his side but his head was, was turned that way.

Q. Well, did the lockers -- A. It hit --

Q. -- fall in the direction of the door that goes into the locker room or did they fall -- A. Fell --

Q. -- at right angles? A. They fell in a direction of the door.

Q. In the direction -- A. And what happened, it hit the door and it swung down, the bottom of the door, and swung over to -- this way.
345 Q. Do you mean by that that when the lockers fell into the room that they came sufficiently close to touch this door when it was open? A. No. They didn't touch the door at all because I was in that space.

Q. What? A. I was in that space.

Q. But didn't you say they fell against the door? A. Not against it, no, sir.

Q. Well, what part -- A. Towards the door. Towards.

Q. Towards the door but never did hit it? A. No.

Q. When you came in there that door to the locker room was opened, was it not? A. Yes, sir.

Q. Was it opened all the way? A. As far as I know, yes, sir.

Q. I believe you have already said his feet were towards the door? A. His feet were not towards the door.

Q. Which way were they? A. They were towards the corner of the wall.

Q. To the right of the door as would his -- A. When -- where the lockers were standing up. You know, where they are standing up
346 against the wall.

Q. Yes. A. They were towards that first set of lockers. That is the angle I found them at.

Q. Well, then can you place that in relation to the position one might be entering that room in which the lockers were? Would his legs have been going out to the left of one or to the right of one entering the room? A. They would be to the left of one entering the room, yes, sir.

* * * * * *

BERNARD C. O'LEARY

was called as a witness for and on behalf of the Defendant * * *

DIRECT EXAMINATION

by MR. ANDERSEN:

Q. Mr. O'Leary, will you please state your full name and address to the Court and jury and please speak up so that everyone can hear you?
347 A. Bernard C. O'Leary, 2205 Forty-second Street, Northwest, Washington.

* * * * * *

Q. And what is your occupation, Mr. O'Leary? A. I am superintendent of the building at Georgetown Medical and Dental Schools.

Q. And how long have you had that position? A. In my twenty-second year now.

Q. Then you were the superintendent of the building on the 15th of June, 1951? A. Yes, sir.

Q. Are you familiar with the locker room in which Thomas Healy was injured on the 15th of June, 1951? A. Yes, sir.

Q. Will you describe that room to the Court and the jury?
A. Well, it is a room right off of our second floor corridor. It is a vestibule there leads into the ladies room and to the left of this vestibule leads into the girl medical students' locker room.

* * * * * *

350 Q. *** How long had those lockers been in that room? A. They were put in there in September, 1948.

Q. Can you tell the Court and jury as to whether or not the floor in that locker room is level? A. It is level.

351 Q. It is level? A. Positively.

Q. Can you tell the Court and jury as to whether or not these lockers were standing straight or were they tilted? A. Standing straight.

Q. Can you tell the Court and jury whether or not there has ever been an accident involving these lockers before?

MR. HILLAND: I object to that, Your Honor. That is not relevant or material. There has always got to be a first time, your Honor.

THE COURT: The witness may answer.

THE WITNESS: What was the question? Have we ever had any accidents?

BY MR. ANDERSEN:

Q. Have these lockers ever fallen before?

MR. HILLAND: Just a minute. Your Honor, there is another reason. This witness wouldn't be competent to testify to that. He hasn't always been there to see whether they had fallen or not.

THE COURT: Of his own knowledge. If he has observed an accident that would be the extent to which he could testify.

MR. ANDERSEN: And, if the Court please, he has testified that he has been there for these many years and that these lockers were put

352 in since he has been there.

THE COURT: He can testify as to his own knowledge, of course,--

MR. ANDERSEN: Yes, sir.

THE COURT: -- and nothing else.

BY MR. ANDERSEN:

Q. Will you answer the question? A. No, we have never had an accident with those lockers or any other type lockers.

MR. HILLAND: I move to strike that out, your Honor, on the ground that it is not responsive to the question. He was asked whether

or not they had ever fallen before.

THE COURT: Just a moment. You may cross-examine but the question was whether they had ever had an accident as to these particular lockers.

BY MR. ANDERSEN:

Q. Do you have other lockers similar to these throughout the school? A. Yes, sir.

Q. How many?

MR. HILLAND: I object to that as being irrelevant and immaterial, Your Honor.

THE COURT: I don't believe that the other -- we will limit ourselves to the lockers in this case and the material alleged to be involved.

353 MR. ANDERSEN: Yes but, if the Court please, the plaintiffs are seeking to make quite a point of the fact that these lockers were not bolted to the walls and with this witness who is familiar with these lockers and with all the lockers in the building all being the same, the question is whether or not they should be.

MR. HILLAND: If your Honor please, negligence throughout the building doesn't excuse negligence in this place.

THE COURT: The Court has ruled on the matter. We will limit ourselves to this situation.

BY MR. ANDERSEN:

Q. Did you after this accident test the tilt of these lockers? A. Yes, sir.

Q. And of this particular locker that fell? A. (The witness nodded affirmatively.)

Q. Well, will you tell the Court and jury what you found as a result of your tests? A. Well, I found that we had to tilt that locker thirteen inches and a half out at the top to throw it off of balance to fall down; otherwise it would have went back to the wall.

Q. And how did you -- how did you tilt the locker in order to make that test? A. Well, I put a man on the front of it -- two men on

354 the front and let them tilt it over. When it let go we found out

where it would overbalance itself and fall to the ground, of course, measuring from the point that it started at, the wall, and the point where it would tilt, we got thirteen and a half inches out of it.

Q. Now, it is a fact, isn't it, that these lockers were not bolted to the walls prior to this? A. No, they were not.

Q. As the superintendent of the building, was there any occasion or was there any reason that presented itself to you that made it necessary to bolt them?

MR. HILLAND: I object. That just calls for the opinion of the witness, your Honor. That is for the jury to decide.

THE COURT: Yes, I think that is a conclusion. That invades the province of the jury. The objection is sustained.

BY MR. ANDERSEN:

Q. Do you know whether or not that room was ever locked or what was the practice with reference to that room? A. It was left open at all times. The lock -- the door can be locked by just pushing a push-button if the girls wanted to use it privately, but that was up to them. When they came out they could open it again.

355 Q. And as I recall your testimony it was for the use of this student -- A. Female students.

Q. The female students? A Yes.

Q. At the University -- at the -- A. Medical and Dental School.

Q. The Medical and Dental School. Can you testify, Mr. O'Leary, how long this particular locker had stood in that one place without falling?

MR. HILLAND: I object. He has already been over that, your Honor. He said they were put there in September, 1948.

MR. ANDERSEN: And that they had not fallen?

THE COURT: Well, doesn't that cover it?

MR. ANDERSEN: Yes, I think that will do. That will be repetitious. I have no further questions.

CROSS EXAMINATION

BY MR. HILLAND:

Q. Mr. O'Leary, I show you what has been marked Plaintiffs'

Exhibit No. 4-A and ask you if that entrance there over which the word "ladies" appears is the entrance into the area where the room is in which the lockers were? A. Yes, that is the vestibule.

356 Q. Now, that entrance had a door on it, did it not? A. Yes.

Q. And that door was marked or had painted on it women restroom? A. (The witness nodded affirmatively.)

Q. So that when that door having women restroom painted on it was closed, the areas behind that door and within the enclosure made by the closing of that door consisted of this little foyer, three by -- three feet, seven inches by five feet, seven inches, and this room in which the lockers were and the room in which the toilet facilities were. Isn't that right? A. Yes.

Q. Those were the three areas back of the door marked womens restroom? A. Just the locker room and the ladies toilet. Now, of course, the window ---

Q. But those areas --

MR. ANDERSEN: Wait a minute, Mr. Hilland. Give him a chance to finish.

THE WITNESS: There is two rooms there, the ladies toilet and the locker room; off of this vestibule at the entrance from the corridor, in other words.

BY MR. HILLAND:

Q. But all three of those areas were behind the door marked

357 women restroom? A. Yes. But that door, I doubt whether that was closed.

Q. Sir? A. I doubt whether that door is ever closed. You will never find it closed there, the one in the corridor.

Q. And that was also true of the door into the room where the lockers were that was left open? A. Yes, unless the girls themselves closed it.

Q. Now, were you present when the lockers fell on Tommy Healy on June 15th, 1951? A. I wasn't present in this area. I was in the building the day the accident happened there.

Q. But you weren't there to see the lockers fall? A. No, I wasn't.

Q. Now, did you have anything to do with -- strike that. How often was that room cleaned? A. Every day.

Q. Did you have anything to do with the cleaning of it? A. Yes, they were under me, the housekeeper.

Q. Did you clean it? A. The housekeeper, the janitors cleaned it, yes.

Q. But how about you? Did you have anything to do with the cleaning of it? A. You mean personally?

358 Q Yes. A. No, I don't clean it. The house -- the janitors under me clean it.

Q. Now, after those lockers were placed in there in September, 1948, how often did you have occasion to go in there? A. Well, just on regular rounds, to see what was going on as superintendent of the building. I have to check up on what building -- what the needs around the place, quite a few things that we have to look after.

Q. And that is recognized, Mr. O'Leary. What I am trying to do is find out how many times or how often you did that? A. Well, as a rule, say, Saturday afternoon I took for rounds of the building.

Q. Now, you were never in there when the female medical students were using those lockers, were you? A. No.

Q. So you never had occasion to see whether or not the lockers would or would not tilt when they were being used, did you? A. No, I can't say positively. But if they had tilted I think we would have gotten some complaint about them.

Q. But you were never there to see whether or not they did or didn't when they were in use? A. I have been in the room when the

359 girls come in, maybe, to put a book in a locker or something of that sort, but it was just on business that we would have in there.

Q. Now, how many times did that occur that you were in there like that? A. Oh, I wouldn't say once a month or something --

Q. What, sir? A. Once a month, maybe, we would be there like that.

Q. Were those lockers made of steel? A. Yes, sir.

Q. Do you know how tall they were? A. They are six foot, six inches tall.

Q. Do you know how much a section of three of them weighed? A. No, I would say over a hundred to a hundred and twenty-five pounds.

Q. Those lockers had four legs each, did they not? A. Three locker section has got four legs in the front and two in the back.

Q. And those legs were so made by the factory so that both the front and back legs could be bolted to the floor or the front legs could be bolted to the floor and the back legs could be bolted to the wall, were they not? A. The back legs have holes in the steel in the channel line which is the legs in the back. But those holes are on the side of the

360 thing and that would -- that would be more for putting feet on them to protect your floor, I think, than it would to bolt because they are not on the right side to bolt on.

Q. What do you mean they are not on the right side to bolt? A. Well, the channel line, of course, comes up and crosses. Now, the hole, if we were looking at the wall, the hole is on this side of your channel line there.

Q. You mean the hole isn't up against the wall? A. Not up against the wall.

Q. Are you sure of that? A. Well, my best recollection, it is, no, sir. It is on the side here.

Q. I show you -- A. The one on the front --

Q. -- some pictures of the back legs. I am showing you Plaintiffs' Exhibit No. 4-I. That shows the holes in the back legs against the wall, does it not? A. It looks like these two here have. I can't see whether the other down here have or not. But if there are holes in there I still would think that they are for feet on there instead of letting your angle iron down against your linoleum or asphalt tile or whatever it may be.

361 Q. Now, those holes which are up against the wall, you are referring to those two right there that I am pointing to, are you not? A. Either

holes down in the bottom --

Q. And you say they weren't made to fasten the lockers to the wall? A. I wouldn't think so. The front, the front ones have them on the side and that would be just for a spread of a foot, and that would be angled on this to keep your angle iron from pressing down and putting a depression in any soft floor.

Q. What do you mean by that, the holes in the front ones weren't made so that they could be bolted down to the floor? A. Not unless you put feet on them.

Q. Sir? A. Put the feet on the bottom --

Q. Well, these had feet on them, didn't they? A. The front ones had feet on them. The back ones don't.

Q And those front feet had holes that were down to the floor so they could have been bolted or screwed with large screws to the floor? A. They have got holes on the feet which extends back maybe an inch or an inch and a half from the front of the locker, but --

362 Q. And that is for the purpose of --

MR. ANDERSEN: Mr. Hilland, would you please let him answer the question?

THE WITNESS: I would think that bolting to the floor, you wouldn't get much safety there on a locker six foot six high. If they wanted them bolted to anything I should think they would leave ears on the back of them to bolt them to the wall and put them from the top of that locker down -- would tear out quite a good plug in the floor.

Q. They had places at the top of them where they could be screwed to the wall too, didn't they? A. Not that I know of. No ears or anything on them.

Q. All right. I show you Plaintiff's Exhibit No. 4-H and ask you if that doesn't show that they had strips of metal at the top with holes in them for the purpose of screwing the lockers to the wall at the top of each section? A. I think I will have to differ with you here. I think that this picture might have been taken after they were bolted to the wall and that is the angle iron on it.

Q. Well, now, you call these little things up here angle irons?

A.(The witness nodded affirmatively.)

Q. And that little thing over there at the top, two of them shown in this picture marked Plaintiffs' Exhibit 4-H? A. Yes.

363 Q. And the angle irons are on there, are they not, for the purpose of bolting the lockers to the wall? A. We put them on. We made them.

Q. Yes, but that is what they are there for? A. Yes.

Q. Now, this doesn't show that they are bolted to the wall at that time when these pictures were taken, does it?

* * * * * *

Q. Those lockers aren't bolted to the wall as of the time that those pictures were taken, were they? A. It looks to me like they were.

Q. All right. I will show you Plaintiffs' Exhibit No. 4-I. Are either the front or back legs there bolted to the floor? A. Nope.

Q. I will show you Plaintiffs' Exhibit No. 4-G. Does that show whether or not the front legs of the lockers are bolted to the floor? A. No. I don't contend that the legs were bolted at any time.

364 Q. They are bolted now, aren't they? A. No, not the legs.

Q. What is bolted now? A. Just the top of the locker here where you see these --

Q. And when did you bolt them at the top?

* * * * * *

A. After the accident we went into this particular room and bolted these lockers just to keep anything from happening there again, but we still didn't think they were unsafe before.

Q. Were you present when those pictures were taken? A. No, sir.

Q. Sir? A. Don't remember them.

365 Q. Were you present when any pictures were taken? A. Don't remember ever seeing anybody in there. I heard there was somebody around but I have never -- I don't think -- contacted anybody or they have never contacted me to get in.

Q. So you don't know from your own personal knowledge whether

those lockers were bolted or screwed to the wall at the top of the lockers at the time those pictures were taken, do you? A. I would say --

Q. No, -- A. -- they were.

Q. -- I am asking you of your own personal knowledge. You don't know whether they were or were not? A. No, I can't say that.

Q. However, you think when you looked at those pictures they were? A. This picture was taken after the lockers were bolted to the wall.

Q. That is what you think? A. (The witness nodded affirmatively.)

366 Q. Sir? A. Yes, sir.

Q. What kind of a floor was in this room in which the lockers were? A. It is a concrete floor with a linoleum on it.

Q. Isn't it an asphalt linoleum floor? A. No, straight linoleum.

Q. Regular linoleum? A. (The witness nodded affirmatively.)

Q. And is that wall to wall linoleum? A. Yes.

Q. What seal, if any, is there around the outside of that linoleum on the four walls of the room? A. What seal?

Q. Yes, what kind of seal is there? A. Well, the linoleum has a black border around it about eight or nine inches wide but as far as seal, it was put in there when the building was built and I couldn't tell you what the seal was. I guess the regular linoleum seal.

Q. When was that building built? A. 1929 or '30.

Q. That linoleum had been on the floor from 1929 until June 15th, 1951? A. (The witness nodded affirmatively.)

367 Q. It wasn't the kind of linoleum then that they make today, whether asphalt linoleum or whatever it is baseboard, with the linoleum meeting it exactly as the floor would, was it? A. I don't understand you, sir.

Q. All right. What was the baseboard made of in June, 19- -- A. It is a metal baseboard.

Q. It is a metal baseboard? A Yes.

Q. And to a concrete floor? A. Yes.

Q. And then this linoleum, that was put on it in 1929? A. It abuts

right up to the baseboard.

Q. So that it was open and there was nothing to prevent dirt and debris from gathering under that linoleum, was there? A. It is not open.

MR. ANDERSEN: I object, if the Court please. There is no evidence that there was dirt and debris under these lockers.

THE COURT: The Court doesn't recall anything of that nature.

MR. HILLAND: Well, it is a question of -- not a question that there was, but there wasn't anything to prevent it from getting under
368 the linoleum, is all I am trying to develop.

THE COURT: Well, we will proceed.

BY MR. HILLAND:

Q. Will you answer the question? A. Whether there was dirt under the edge of the linoleum?

Q. No, sir. I asked you if it isn't a fact that the linoleum was so laid there was nothing to prevent dirt from getting under it, if there was dirt? A. No. The metal baseboard that they used took care of that at the bottom there where you run right up to it and there wouldn't be any chance of getting dirt in there unless the linoleum was damaged, which it isn't.

Q. Well, the baseboard did not go over the top of the linoleum, did it? A. No, it abutted up to it.

Q. The linoleum was over the top of the floor and the baseboard? A. Not over the baseboard. Abutted up to it.

Q. Did you indicate awhile ago that the baseboard curved out at the base of it? A. It just took care of the linoleum at the bottom. That is all. There was no curve.

Q. Well, you say it took care of it. How? Was it a straight base-
369 board or was it a curved baseboard? A. The baseboard, say about six inches high, comes on down. It is made of metal. And at the bottom it is the slightest little bit of height there for the linoleum to fit up and be even with it -- in other words, the baseboard and the linoleum would be even at the bottom of this little curve.

Q. All right. A. Which don't amount to much.

Q. What you are saying then is: That that baseboard at the bottom or base of it was a little higher than the concrete floor? A. No. No, I can't say that. It come out to meet it. The baseboard was made for that to meet this and --

Q. To meet what? A. To meet the linoleum and you had the same height right at the point of the baseboard that you have for the floor which doesn't mean that there is any step-up at all. You just went off of that gradually.

Q. The linoleum was on top of the concrete floor, was it not? A. Yes.

Q. And how thick is the linoleum? A. Oh, five eighths.

370 Q And the linoleum came flush with the base of the baseboard, didn't you say, or level? A. Yes.

Q. All right. In order for that to have occurred wasn't it necessary to make the base of the baseboard a little bit, five eighths of an inch, higher than the concrete floor?

MR. ANDERSEN: I object, if the Court please, as to whether or not it was necessary to make it that way. The question is whether or not it was that way.

MR. HILLAND: Well, that is what I am trying to find out.

BY MR. HILLAND:

Q. Is it a fact that the base of the baseboard was higher than the cement floor to the thickness of the linoleum on top of the cement floor? A. No, sir, it wasn't a difference.

Q. What? A. Could I show you on the board just what I mean?

Q. Yes.

(Thereupon the witness went to the board.)

A. This is the baseboard. It takes the least little turn and then it flattens out here. So that the height of the linoleum is just on a line with the baseboard coming around there. So that the floor is continuous

371 right on to the baseboard.

Q. Which level there represents the concrete floor? A. This.

This is the linoleum, and this is the baseboard right here.

Q. So that the linoleum comes up five eighths of an inch on the baseboard? A. Up to this point on the baseboard which is a continuation right across there of that. And it takes a little, just a little bit of a turning up there.

Q. Just a minute, does the baseboard at that point -- have you intended to indicate that there is a flare-outward on the baseboard at that point? A. Just slight enough to give us this here, which wouldn't be -- it wouldn't be out a quarter of an inch at that point.

(Thereupon the witness resumed the witness stand.)

Q. When you made this tilting test I believe you said that you had a couple of men there assisting you? A. (The witness nodded affirmatively.)

Q. And where did they stand when the lockers were tilted?

A. Well, two of them were in front of the lockers.

372 Q. Sir? A. Two of them were in front of the lockers, the two men I had with me. We pulled the locker out from the wall and I measured from the wall just like the lockers were backed up against here now. These two men were here. We tilted the lockers out and took a measurement on how far the locker could go out without over balancing and falling out to the front. And that was thirteen and a half inches that it would have to be pulled out here before it would start down to the ground. Anything less than that it would go back to the wall.

Q. Were those lockers empty when you made that test or were they full? A. Empty lockers.

Q. All three? That one section was empty? A. Yes.

Q. Now, after Tommy Healy was injured did you go up and examine the three lockers that fell on him? A. Yes, we had to go up and put them back in place.

Q. Did you examine them to see what contents were in any of those three lockers when they fell on him? A. They were all empty.

Q. They were all empty at that time? A. (The witness nodded affirmatively.)

Q. You mean they were not in use at that time? A. No.

373 Q. You mean there were no female students there at that time? A. Well, at that time you had your commencement and they were out on their summer vacations. The lockers were empty.

Q. So that that room was empty and not in use at the time Tommy Healy was injured? A. Most likely not. Yes.

Q. Is that right? A. Yes.

Q. And how long -- for how long had that room not been in use at the time he was injured? A. Well, the commencement, as a rule, is about June the 8th, and then they will be out of there mostly after that.

Q. All right. And even though they had gone that door into the room where the lockers were had been not only left open but unlocked. Is that correct? A. Yes. Still, see, that somebody could come in and use them because we have freshmen and sophomores in there, the sophomores going to the hospital, but I would say offhand it wasn't in use or not in general use at the time.

Q But the door was left open at all times, I believe you said, for anybody to walk in?

374 MR. ANDERSEN: I object, if the Court please. He did not say that the door was left open for anybody to walk in.

BY MR. HILLAND:

Q. All right. Did you say that the room was left open at all times - period? A. I said it was left open unless the girls wanted to close it. If they were in there changing their dress or uniform or something it was up to them to close it then.

MR. HILLAND: That is all.

REDIRECT EXAMINATION

BY MR. ANDERSEN:

Q. Mr. O'Leary, with reference to these angle irons that Mr. Hilland has brought out, did they come as equipment with these files? A. With the lockers?

Q. Or with the lockers? A. No. There is nothing at all on the lockers that you could hook them up by or tighten them to the wall. We make these and put them on there.

Q. And you made these angle irons? A. It looks to me like they are -- yes, there is nothing on the locker like that when they came.

* * * * * *

388 MR. HILLAND: Mrs. Healy, will you take the stand, please?

MR. ANDERSEN: May we approach the Bench, your Honor?

THE COURT: You may.

(At the Bench:)

MR. ANDERSEN: Now, if the Court please, you will recall that I had entered into the record the fact that Mrs. Healy has been sitting

389 in the courtroom all during the trial and that she passed up a note to counsel at the time Mr. Brown was on the stand. She is a witness in the case. She is not a party to the case. Witnesses are excluded and I object to her being recalled at this time because she has sat in the courtroom.

Now, counsel knows full well that if he intended to cali her she should have been excluded from the courtroom, but nevertheless and in spite --

THE COURT: Not so loud.

MR. ANDERSEN: -- and in spite of my objection he permitted her to remain in the courtroom and I am now objecting to her taking the stand.

THE COURT: Well, the rule is that a witness may remain in the courtroom after his testimony or her testimony has been given. Of course, if she is going to be called further as a witness the rule of exclusion would apply.

MR. HILLAND: Purely rebuttal, your Honor. I am only going to ask her to rebut one piece of evidence about whether or not her children were the children who were running up and down that corridor. That is all.

THE COURT: This witness didn't testify to anything about that.

390 MR. ANDERSEN: Well, my objection is that she is not eligible now.

MR. HILLAND: Oh, yes, and what she told Doctor Burke about the history of the child; those two things. She hasn't heard anybody else.

THE COURT: I don't think her presence here would bar her from

testifying to those matters. It is a matter in the discretion of the Court. I don't think it is anything at all that is prejudicial. The only witness that has testified to these things, if she is only going to testify to those things, --

MR. HILLAND: That is all. Nobody else has testified to those two facts on her side.

MR. ANDERSEN: It doesn't make any difference whether she is going to testify to that or what she is going to testify to. The fact is that she should have been excluded.

THE COURT: Well, I will permit the witness to testify.

MR. HILLAND: Thank you, your Honor.

(End of Bench conference.)

Thereupon

MRS. JAMES D. HEALY

was recalled as a witness for and on behalf of the Plaintiffs, and having been previously duly sworn, resumed the witness stand and testified further as follows:

391 DIRECT EXAMINATION

BY MR. HILLAND:

Q. Mrs. Healy, on June 15th, 1951, while your son, Jimmy, was in oral surgery at Georgetown Dental Clinic having a tooth extracted and an x-ray where were you and your son, Tommy, and your daughter, Betty Ann? A. We were in the waiting room across the corridor from where Jimmy went into an entranceway in front of a receptionist's desk. That was when I last saw Jimmy. He entered a door there just before you approach the reception desk.

Q. I show you Plaintiffs' Exhibit No. 4-A and were you in the waiting room in which you said is marked "waiting room" in that picture? A. That is correct.

Q. And while you were waiting in there did you permit either Tommy or Betty Ann to leave that room? A. Tommy and Betty Ann, neither one were ever away from me. We were seated there. We read magazines. We talked with other children in the room, other adults.

We spoke to the receptionist who came in and out of the room and we went together to the women's restroom.

Q. Did you ever permit either -- did you ever permit Betty Ann and Tommy or either of them to run up and down the corridor or hallway?

392 A. I did not, Mr. Hilland, then or any time when they are in my care.

Q. Were there other children in and about that floor of the dental clinic that day? A. Yes, there were.

Q. About how many? A. Well, I can't say positively. On the first floor there were certainly eight or ten children where we first went to the dental clinic. We were then sent upstairs to the oral surgery department. There were other children, I think at least two, maybe more, but it is my recollection at least two in the waiting room at the time I was in there in addition to my two which would make four.

There was a child with an adult, a grown person, in the foyerway or in the area of the bathroom. So in actual numbers I guess you would count them counting my own two and the other two there were possibly five children, six children on the second floor. There were more than that I am sure, on the first floor.

Some gentleman testified here today about children in the corridor. They were crowded. That waiting room was filled. The seats were taken in the waiting room that I waited in.

393 Q. When Tommy was examined by Doctor Frederic Gerard Burke on March 29th, 1955, in his office were you there? A. Yes.

Q. At that time and place did you tell Doctor Burke that Tommy had always been clumsy? A. No, I did not. I was asked to go to Doctor Burke's office. I got a letter from you stating -- I believe that Mr. Andersen or maybe it had the full title of the defense, had requested that we go to a Doctor Frederic Burke's place for a physical examination, and would I please call and make the appointment and necessary arrangements, and I proceeded to do so. And I took him and I was present.

Q. Did you tell Doctor Burke that Tommy had at any time been clumsy and if so, when? A. I definitely told Doctor Burke that Tommy

was very noticeably clumsy; that he was noticeably different than my other children and that I had observed it since his injury. I also stated that all of my children were active children as was Tommy but that he in every way had normal behavior patterns other than this clumsiness and accident proneness and that he seemed to be subject to many mishaps following his injury.

Q. Did you tell Doctor Burke that Tommy had been accident prone all of his life? A. I did not, because Tommy was not accident prone all
394 of his life, any more than any average three-year old falls or stumbles when learning to walk or playing.

MR. HILLAND: Your witness.

CROSS EXAMINATION

BY MR. ANDERSEN:

Q. Did you know Doctor Burke prior to this time? A. I have known of Doctor Burke and many of the people associated with him all of my life.

Q. Had you talked to Doctor Burke prior to this examination? A. I have socially but not in any way connected with Tommy or the accident.

Q. You have talked with Doctor Burke prior to this accident? A. I can't say that it was prior to the accident, Mr. Andersen. I have seen Doctor Burke socially in and about Washington on more than one occasion.

Q. Now, my question is: Was that prior to the accident or prior to the -- A. To the best of my knowledge it has been within the last five years. I know of one party in particular where I saw him and it is not prior to the accident. It is since the accident. I knew Doctor Burke in his position at the time Tommy was hospitalized at Georgetown. He
395 maintained an office on the pediatrics floor where Tommy was hospitalized. I knew patients in the hospital that Doctor Burke was in attendance to at that time who were personal acquaintances of mine, adult and child.

Q. Had you had any conversation with Doctor Burke about Tommy

prior to the date of the examination? A. No, sir.

Q. Then all of the information which Doctor Burke has has come out of the examination on that date in March. Is that right? A. Other than what you might have given him, but what I gave him he only knew from my visit with him - not any time in conversation prior to my visit to his office.

Q. Now, Mrs. Healy, why do you say other than what I have given him? Do you know -- A. Well, this morning when I was present and there was some discussion back and forth some way information had been submitted to Doctor Burke for his review pertaining to our accident, of course, would be prior to my visit to him, because I didn't see Doctor Burke until about a year ago.

Q. Now, you are referring to the testimony of Doctor Burke in court and the matter that was brought out that I asked Doctor Burke to make this examination. Is that right? A. That is right, Mr. Andersen.

396 Q. And you heard Doctor Burke so testify this morning. Is that right? A. Well, will you review the question again before I answer "yes" to he so testified? You mean, it is the information that he had concerning my child and the injury?

Q. Really the only thing that I am trying to get out is that all that Doctor Burke knows about this incident is what he got from you on the date of the accident? A. Sir, I do not know that.

Q. Not on the date of the accident but on the date of the examination. A. I do not know that for facts because we have mutual acquaintances that he is quite friendly with. They are well acquainted with my child.

Q. Now, you are now inferring then that Doctor Burke got some information from another source? A. I am not inferring that, Mr. Andersen, by any means at all. I am merely trying to answer your question to the best of my knowledge. The only information Doctor Burke has from me is what I told him when I was in his office discussing my son, Tom. Dr. Burke knew Tommy was in the hospital in 1951. I am certain of that. I passed him in the corridor at that time many times that week. And since he was resident pediatrics I am sure he had

397 occasion to look in on Tom. If not just by being an interested party, by being the doctor in charge of that ward he surely must have. Plus the fact that we had acquaintances who were then hospitalized who were mutual acquaintances. So whether he discussed my Tommy or whether he placed who I was then, I don't know.

He is a member of my parish in Bethesda. He attends my church as do his children and I have current knowledge of Doctor Burke. He is one of our finest pediatricians, I am sure.

Q. Are you through? A. Yes, sir.

MR. ANDERSEN: Now, if the Court please, on the basis of my original motion I think that this testimony ought to be stricken because of the rule of exclusion of witnesses, and it is obvious that this witness who has been sitting in the court and listening to this testimony, her testimony is framed around testimony that she heard here. I think that her testimony should be excluded at this point.

THE WITNESS: Mr. Andersen, if I may --

MR. HILLAND: Just a minute. Leave that argument to me.

THE COURT: Now, the Court will advise the jury in its instruc-
398 tions that it shall take into account all the facts and circumstances which the jury feels pertinent to take into account in connection with any testimony that is given.

Now, the motion which the defendant makes is made upon the basis of a perfect right on the part of defense counsel to make it. The Court has indicated its attitude at the Bench. It doesn't see that that attitude is changed by anything that has transpired since the Court made its announcement at the Bench and the objection will be noted and the motion, rather, if it is a motion, will be noted, and the objection or motion, whichever form it is in, will be overruled.

* * * * * *

THE COURT: I presume the defendant wishes to renew its motion made at the close of the plaintiffs' testimony.

399 MR. ANDERSEN: Yes. That is what I would like to do, if the Court please, and reassert that the plaintiff has failed to show any

negligence on the part of the hospital.

THE COURT: Well, the Court's ruling --

MR. ANDERSEN: Now, wait a minute. I was just waiting for you to catch up.

THE COURT: I beg your pardon.

MR. ANDERSEN: And the plaintiff has failed to show the cause of this accident. As the case now stands it is strictly speculation as to what actually happened. There is no evidence whatsoever as to what caused these lockers to fall.

It is strictly speculation and the jury is going to be called upon to speculate as to what happened. All we know is that the boy was in there and the lockers were on top of him.

Further, if the Court please, there is absolutely no evidence in the record to show that the child was attracted into this room by the lockers, no evidence whatsoever that he was attracted by these lockers. On the basis of a case which I found after our discussion yesterday and the citation of which I gave to your Honor's Clerk, which is Manos vs. Myers-Miller Furniture Company, --

MR. HILLAND: What is the name of it?

400 MR. ANDERSEN: M-a-n-o-s --

THE COURT: M-y-e-r?

MR. ANDERSEN: M-y-e-r-s, which is 124 S.E. 357, which is a case almost on all fours with this.

It involves a situation where an infant diverted from an alleyway into a room where there were some shelves maintained by the occupant of the building, the owner or the occupant of the building. Shelves.

And those shelves were approximately six foot tall. It is clear in that case that the shelves were defective in that they were wider at the top thanthey were at the bottom and this child went in there and climbed the shelves.

Now, mind you, that is a much, much stronger case than we have here. He climbed the shelves. They toppled over and struck him on

the head, killing him. And that case, which cites many cases in the Supreme Court, held that -- they actually dismissed the petition before they went to trial.

They dismissed the case, holding that shelves of that nature are not an attractive nuisance which would make the owner or the occupant of the premises liable for injury to a youngster. That case holds that there was no breach of a legal duty.

And in this case I ask what is there in this case in the evidence to show that there was a breach of a legal duty on the part of this
401 defendant?

That case holds as do many other cases that the occupant of the land is under no duty to keep the premises safe from trespassers and this was a mere child. Now, applying that case to ours and the exact words of the Court were:

"The shelves were not inherently dangerous, * * *"

Here, with these lockers, there is absolutely no proof in the record to show that they were inherently dangerous nor could they be called alluring. In that case you have shelves which actually are more alluring than a locker because there you have something that the child can climb up on.

But here we don't have that even and there is no evidence in this case to show that these lockers were alluring. And then the Court goes on further and says:

> "* * * and unless the defendant could have reasonably anticipated that trespassers would be attracted by them, so as to enter upon its premises, and afterwards" --

THE COURT: How is that last part, unless what?

MR. ANDERSEN: Unless the defendant, who is the occupant of the land, could have reasonably anticipated that trespassers would be attracted by them, the shelves -- now, we have no evidence in this case that Georgetown could have reasonably anticipated that a child --

402 THE COURT: Now, on that very question the Court is not sitting as a member of the jury. The Court is sitting in passing on a motion

in which all of the evidence must be construed most strongly against the movant or against the defendant in this case.

Now, I think maybe the Court stated this at the close of the plaintiffs' testimony, but that argument may be a potent argument to make to the jury but the question that the Court has to consider is, is there sufficient evidence, construing all of this testimony most favorably to the plaintiff, the respondent to the motion, is there sufficient evidence to justify the Court in submitting the matter to the jury and allowing the jury to make a determination as to whether in all the circumstances, taking into account all the facts and circumstances, there is a justifiable basis for determing that this constitutes an attractive nuisance.

Now, you are asking the Court as a matter of law to hold that in all of these circumstances, and I am not going to relate them because we all know them, as a matter of law there is nothing to submit to the jury on the question as to whether or not there was anything out of the way attractive or whether or not the child, possessing the characteristics and tendencies and predilections and general mental attributes of a child three and a half years, would or would not have been attracted to the
403 instrumentality involved here and to have approached them.

Now, the Court in passing on this question, as to the manner in which it might pass upon them, read from the restrictions which are imposed upon the Court when it passes upon them upon a motion for a directed verdict.

The Court might well reach the conclusion that there was nothing in the whole situation to constitute a situation which would involve the doctrine of attractive nuisance.

The Court is not permitted to pass on it in that posture. The Court must pass upon it with the restriction that is noted.

MR. ANDERSEN: May I say this? I agree that the Court does not pass upon the evidence. That is up to the jury.

THE COURT: It has to take into account the evidence to pass on your motion, of course.

MR. ANDERSEN: But the Court is also -- the Court also has the responsibility of not permitting a jury to speculate as to what has happened and I think it is very clear --

THE COURT: You are really getting into a different field now when you say speculate as to what happened; that is to say, speculate as to what was the conduct of the child. There is no speculation as to

404 what the physical facts of the locker were. There is no speculation about that.

You are saying that the Court shouldn't allow the jury to speculate as to whether or not those lockers, such as they were, would constitute an attractive nuisance for a child the age of the child involved in this accident.

That is the very part that the Court was talking about.

MR. ANDERSEN: The Court has sat through this trial and the Court has heard all the testimony in this case.

THE COURT: That is right.

MR. ANDERSEN: Now, I should like to assist the Court in ruling on this. I should like to ask the Court what caused these lockers to fall?

THE COURT: Well, if I were sitting on the jury I think I would take into account all of the evidence and make a determination. I think there is sufficient evidence here to support a finding as to what caused these lockers to fall.

MR. ANDERSEN: What?

THE COURT: There is no evidence that there was anyone in the room but the child. Now, I don't want to argue the case for the plaintiff. I am simply saying that the Court doesn't have to determine what caused these lockers to fall. The Court must pass upon the question as to whether the Court is justified in submitting it to the jury under all of the testi-

405 mony --

MR. ANDERSEN: But there must be --

THE COURT: -- in the light of the restriction which the Court has mentioned in passing upon a motion for a directed verdict as to

whether there is sufficient evidence to justify the Court in submitting to the jury the determination of the question as to what caused these lockers to fall.

MR. ANDERSEN: When there is no evidence?

THE COURT: Now, you can argue that to the jury. You can argue it to the jury that they have no justification for finding it.

The Court is of the opinion that there is sufficient evidence upon which they can pass upon that question. How they will determine it is not the Court's interest.

MR. ANDERSEN: If the Court please, I submit there is not one scintilla of evidence in this record as to what caused these lockers to fall; not one scintilla of evidence.

Now, let me go a little bit further and refer again to this case. Now, your Honor is quite concerned about taking a case away from the jury, about the facts and issues.

THE COURT: The Court hasn't hesitated to take cases from the jury and the Court is not affected by the fact that the Circuit Court of Appeals on a number of occasions has said that the Court was in error.

406 I am just as free and open minded as I ever was before. Mr. Hilland reversed me twice. I assure you that I am not affected by that. Each case is an independent case and I try to pass upon it and I try to apply the principles of law. I don't want to make a speech and give myself a --

MR. ANDERSEN: That is a fact and we can thank God for our system of jurisprudence.

THE COURT: Thank you. I think we can. That is right.

MR. ANDERSEN: I would like to state to the Court in this case that I am referring to --

THE COURT: You mean the one you cited?

MR. ANDERSEN: The one that I cited was one where there was a precise motion as the motion that I am now making and the Court did rule on the basis of that, assuming that all the facts were true, assuming

that all the facts were true, --

THE COURT: Well, I think you have presented a case that has a considerable analogy. I will say that the headnotes, which some courts say are the controlling factor, don't seem to bear out the entire theory. Some of these states have a great many divisions and I don't know about that but that is neither here nor there.

It is a decision that is entitled to consideration. The Court has read it. The only syllabus by the court was as follows:

407 "The court did not err in sustaining the demurrers to plaintiff's petition."

But the West people, in their diligence, added two. One of them was there can be no actual negligence without breach of legal duty. Of course, that is an obvious statement of the law.

MR. ANDERSEN: We have no evidence in this case of a breach of a legal duty.

THE COURT: Well, that is the question. And the second one is that land occupier is under no duty to have his premises in safe condition for adult trespassers.

I appreciate that. That syllabus by West is rather surprising to me in view of the fact that it does appear to me that the trespasser was not an adult. The trespasser in that particular case was a boy eight years and eleven months old.

I don't believe we need to labor this point any more at this time. I can say, Mr. Andersen, that I am not persuaded that the Court should withdraw this case from the jury. I appreciate that it isn't the strongest case of attractive nuisance that I have ever heard by any means, but I think there is sufficient in the record to justify submission by the Court to the jury as a question of fact, whether or not there is liability on the part of the defendant.

408 I would say that your arguments which you have made so forceably, and I will say that they are impressive, too, are arguments which, in the Court's opinion, should be made to the jury.

MR. ANDERSEN: Thank you.

THE COURT: So the Court will overrule the motion.

* * * * * *

458 THE COURT'S CHARGE TO THE JURY

* * * * * *

481 MR. ANDERSEN: And then there is one other. It seems to me that there ought to be some instruction with reference to conjecture or speculation as to proximate cause.

THE COURT: No, I am not going to give that. You may tender that and the Court will note that. The Court will not grant that.

* * * * * *

489 VERDICT OF THE JURY

was announced as follows:

* * * * * *

490 THE DEPUTY CLERK: Members of the jury, your foreman says that your verdicts in this case are for the infant plaintiff, Thomas

491 Patrick Healy, in the sum of $12,500, and for the plaintiff, James D. Healy, in the sum of $2,500, and that is your verdict so say you each and all?

(No member of the jury indicated any dissent.)

* * * * * *

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,682

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE,
a Corporation,

Appellants,

v.

THOMAS PATRICK HEALY,
an infant,
by and through his father and next friend,
JAMES D. HEALY,

and

JAMES D. HEALY,

Appellees.

United States Court of Appeals
For the
District of Columbia Circuit
FILED
APR 26 1957
Joseph W. Stewart
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

The Questions are correctly stated by appellant, except as to the statement in the first question that the appellant was not afforded a hearing on the motion, and the statement in the fifth question that there was no proof of identification of the infant appellee.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,682

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE,
a Corporation,

Appellants,

v.

THOMAS PATRICK HEALY,
an infant,
by and through his father and next friend,
JAMES D. HEALY,

and

JAMES D. HEALY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

1-2. Facts Relating to District Court's Order Permitting Late Filing of Security for Costs and Its Order Refusing to Dismiss Action on Account of Late Filing of Security for Costs

---

On September 8, 1954, the District Court passed an order granting the appellant's motion and directing the appellees to deposit, on or before

September 18, 1954, One Hundred Fifty Dollars ($150.00) cash or a bond in the amount of Two Hundred Fifty Dollars ($250.00) as security for costs on the ground that the appellees are non-residents of the District of Columbia. The order was entered with the consent of the former co-counsel for the appellees. (J. App. 5-6)

On May 8, 1956, when the case came on for trial, counsel for the appellant called to the attention of the Court for the first time that security for costs had not been deposited with the Clerk. A pretrial hearing of the case had been held, but counsel for the appellant had not raised the question at the pretrial hearing. (J. App. 6)

Thereupon, on May 10, 1956, the appellees filed a motion for leave to file security for costs and supported the motion by the affidavit of former co-counsel who was in charge of the case for the appellees at the time the order for security for costs was entered on September 8, 1954. (J. App. 6 and 8) The appellant has not included in the transcript of record on file in the Office of the Clerk of this Court or in the joint appendix the affidavit of former co-counsel which formed the basis of the rulings of the District Court granting the appellees leave for late filing of security for costs and denying the appellant's motion to dismiss on the ground that security for costs had not been deposited within the time fixed by the order of the District Court.

As indicated in the appellees' motion for leave to file security for costs, the affidavit of former co-counsel showed that at the time of the order of September 8, 1954, he was distracted from his work and from this case by reason of illness in his family and the related personal problems arising therefrom, and that through inadvertence and excusable neglect, he failed to inform the appellees of the said order. The appellees did not learn of the order until May 8, 1956, when they appeared for trial. The affidavit further showed that on December 15, 1954, former co-counsel left the general practice of law, and the failure to comply with the order of September 8, 1954, was not discovered by counsel who were in charge

of the case for the appellees until May 8, 1956, when the case was called for trial, and counsel for the appellant raised the question for the first time. (J. App. 6)

The District Court granted the motion and the appellees filed a cost bond. (J. App. 7, 27 and 30)

Thereafter, on May 14, 1956, the appellant filed a motion to dismiss on the ground that the appellees had failed to comply with the order of September 8, 1954. The bond had then been filed. The appellees filed points and authorities in opposition to the motion, and the motion was denied. (J. App. 9, 10 and 13)

On May 24, 1956, the appellant filed a motion to vacate the order granting leave for late filing of security for costs. The appellees filed points and authorities in opposition to the motion, and the District Court entered an order denying the motion. (J. App. 11-12)

At the outset of the trial, counsel for the appellant renewed the motion to dismiss on the ground that the security for costs had not been deposited within the time fixed by the order of September 8, 1954, and renewed the motion to vacate the District Court's previous order granting leave for late filing of the security for costs, and the District Court denied both motions. (J. App. 25-31)

The appellant did not make any showing of any prejudice to it as a result of the late filing of the security for costs and did not in any manner substantiate the contentions on page 10 of its brief that it was prejudiced and was deprived of a fair and impartial trial as a result of the late filing of security for costs.

3. Facts of the Case as Shown by (a) Appellees' Opening Statement to the Jury, (b) Appellees' Evidence and (c) Appellant's Evidence

(a) Appellees' Opening Statement to the Jury

The opening statement on behalf of the appellees appears on pages 14 to 22 of the joint appendix. It is not summarized here for two reasons;

first, because it is contended by the appellees that the appellant waived its motion for a directed verdict at the close of the appellees' opening statement when the appellant introduced evidence at the close of the appellees' evidence, and, secondly, because it is believed that the sufficiency of the opening statement can be determined only from a reading of the whole of it; and inasmuch as the whole of it appears in the joint appendix, at page 14, a reprinting of it here seems unnecessary.

(b) Appellees' Evidence

The infant plaintiff's mother testified that he was born November 19, 1947, so that, as shown in the appellees' opening statement to the jury, he was only three and one-half years old when he sustained the injuries for which he was awarded damages in the District Court and that on June 15, 1951, the infant plaintiff was an average three-year-old boy, three (3) feet or less, and weighed approximately thirty-six (36) to forty (40) pounds. On June 15, 1951, she had an appointment in the early afternoon, about one o'clock, at the appellant's dental clinic; that she had three (3) of her children with her; namely, her oldest son, James, who was going to be worked on at the dental clinic, and her daughter, Betty Ann, and her younger son, the infant plaintiff, who was three and one-half years old; that they went to the first floor where there is a children's clinic and waited while Jimmy was worked on, and then they were told that he was to have an extraction, and that would be done on the second floor; so they all proceeded upstairs where they were shown to a waiting room while Jimmy was in the oral surgery room across the corridor; that while waiting, they got up to go down to the ladies' room, which was a very short distance from the waiting room; that on the left there was a sign that said "Ladies", and that is where they entered. She identified a photograph of the waiting room, plaintiff's Exhibit No. 4-A. This and other photographs introduced in evidence by the appellees are on file in this Court. As

already indicated, Exhibit 4-A shows the waiting room. (J. App. 33-34) Exhibits 4-B to 4-F, show the women's restroom where the infant plaintiff was injured. (J. App. 34-40) Her testimony and the photographs showed that the women's restroom had a door on which the words "Women Restroom" were painted. The door opened into a small foyer, and as one entered, she faced a blank wall to the left of which was a door which opened into the area where the toilet facilities were, and immediately to the left of that was another door into the room where the lockers which fell, on the infant plaintiff, stood. All of these areas; that is to say, the foyer, the toilet room and the locker room and three doors referred to were within the area labeled "Women Restroom." (J. App. 33-40, 42-44)

Plaintiff's Exhibits 4-G, -H and -I are pictures of the lockers that fell on and injured the infant plaintiff. Exhibit 4-G shows the bottom part of the lockers and the legs. Exhibit 4-H shows the full length of the wall, the top of the lockers where the brackets are and by which they could have been fastened to the wall, and also shows the bottom of the lockers and holes in the feet through which they could have been fastened to the floor, and shows that the lockers are joined in sections. (J. App. 40-41)

Exhibit 4-I shows the base structure of the lockers as the legs rest on the floor, and the holes that are on the bottoms of the legs. (J. App. 41-42)

Mrs. Healy testified that the lockers are approximately six (6) feet high plus the length of the legs which are about six (6) or seven (7) inches long, and that they were steel lockers. (J. App. 42)

The infant's mother further testified that when the door labeled "Women Restroom" was closed, the spaces within the enclosure made by the closed door consisted of a small foyer three and one-half feet by five and one-half feet, two (2) doors that are at angles adjacent to

each other, one of which was an open doorway wherein the lockers that fell on the infant plaintiff stood, and the other a closed door that went into where the toilet facilities were; that on June 15, 1951, when they went in the area, the door to the room where the lockers stood was open; and as they opened the door from the main corridor and stepped into that small foyer, they were forced to step into the room where the lockers stood, the door to which was open, to make way for the lady and other child coming out of the room in which the toilet facilities were, because they could not pass in the small foyer, and one of them had to step aside, into the room where the lockers were; that they stood there momentarily before they went into the door where the toilet facilities were; that as they left the room where the toilet facilities were, they passed again through the small foyer to the main corridor, and again people were coming in, and either they or the other people stepped aside in order to pass. (J. App. 43-44)

Mrs. Healy further testified that when they passed again through the small foyer to the main corridor, her daughter was beside her, and she asked where the infant plaintiff was; that they had just rounded the corner, and he was not there, and in a split space of time, they turned to get him, and before they got him, a crash occurred; that as they went into the room again, the entrance to the room was blocked by the lockers, the point of the lockers lying full into the doorway, the room was covered with the lockers, and the infant plaintiff was under them; that she couldn't see the infant plaintiff, but she could see blood; and with the assistance of someone, she lifted the lockers. (J. App. 44-45)

On cross-examination, Mrs. Healy testified that the night of the day the infant plaintiff was injured, she and her husband went back to the scene of the infant plaintiff's injury, at which time and place Dr. Rault, who was the dean or head or in charge of the Dental Clinic, was also present; that they discussed the accident. She testified "And we went up to the room and at that time Dr. Rault said the door should

have been locked and would have it locked." (J. App. 58)

On redirect examination, she reaffirmed the substance of their conversation with Dr. Rault. (J. App. 61)

Mrs. Healy also testified that upon first arriving and going into the waiting room, there were other mothers there, and another three (3) or four (4) children in addition to hers, and in the room where her son Jimmy was, there were three (3) or four (4) children in addition to hers. (J. App. 61)

The adult plaintiff testified that he is the father of the infant plaintiff; that on June 15, 1951, he received a telephone call, and, as a result, went to Georgetown University Hospital; that when he left the hospital, he went over to the University Dental Clinic with his wife in order to view the location and room where the infant plaintiff was injured; that Dr. Rault joined them, and he asked Dr. Rault if he could see the room where the incident occurred, and he was taken to the room; that at that point the room itself was not accessible; that it had been locked, and someone came with a key, opened the door and they viewed all the premises; that he has taken measurements of the enclosure made by the door which is labeled "Women Restroom;" that the foyer, as you proceed through the door from the corridor, measured five feet, five inches in length and three feet five inches in width; that he described the length as that part which runs parallel to the hallway, and that was five feet, five inches; that, in other words, straight ahead of you, as you entered the foyer, was three feet five inches, and the length to one's right and left as he entered the foyer, was five feet five inches; that he made measurements of the steel lockers and their over-all height was approximately six feet, six and one-eighth or seven-eighths inches; that the steel lockers were in multiple units, and three lockers, which had been welded or bolted together, constituted one unit; that there were three units of three lockers each; that they were metal lockers, painted green; that he examined them to determine

whether or not they were in any way bolted or fastened to either the floor or wall; that he pulled one unit of lockers as if to open the door to get into one of the lockers and found that all three of them came over on him, and he reached up and pushed them back against the wall; that he looked to see whether there was anything to fasten the lockers to the wall, and there were holes both in the legs going down into the floor in which screws could have been placed, and there were holes in the back of the lockers in which screws could have been placed into the wall itself; that there were no screws in the lockers at the time; that they were not fastened in any way in the wall or the floor; that he observed the condition of the floor on which the lockers stood, and where the floor joins the wall against which the lockers were placed in an upright position, there was a slight rise; that it was not a large rise; that there was a baseboard which was of a dark color, and there was some kind of linoleum where the baseboard and floor came together, and on looking he could see there was a slight rise upwards on which the back legs of the lockers rested; that that condition of the floor made the lockers lean a fraction forward at the top. (J. App. 64-67)

The adult plaintiff also testified that on the occasion on the afternoon of the day the infant plaintiff was injured that he met Dr. Rault at the Dental Clinic, he had a conversation with Dr. Rault, and Dr. Rault said that the room where the injury occurred in the women's restroom should have been locked and would be locked in the future. (J. App. 67-68)

The adult plaintiff further testified that he took the picture marked Plaintiff's Exhibit 4-C, and that he is familiar with the location of the door with the words "Women Restroom" written on it; that when that door is closed, "the restroom is immediately behind it which you enter it through another door and it is slightly, slightly to the left as you go through the foyer into the -- sharp left there is another door which enters into another area where the lockers were where Tommy was hurt."

That he took measurements of the room in which the lockers stood; that the size of that room is approximately nine and one-half feet by twelve or by eleven and one-half feet. (J. App. 68)

The foregoing is the substance of the testimony offered by the appellees. The District Court overruled the appellant's motion for a directed verdict at the close of the appellees' evidence. (J. App. 68-69)

(c) Appellant's Evidence

The appellant called Dr. Gustav O. Kruger as a witness, and he testified that he was Junior Professor of Oral Surgery at Georgetown University School of Dentistry;that there is no locker room in his department; that "half way down the hall there are some lockers.**** The women medical students use those lockers. They have a separate room there that they use." That the medical and dental schools are under the same roof; that his department has a separate waiting room, and that they ask that all people who come with patients, whatever their relationship, to stay in that room. (J. App. 76)

On cross-examination, Dr. Kruger testified that in June, 1951, the separate waiting room in the Oral Surgery Department of the Dental School, to which he referred in his direct examination, did not have any toilet facilities, and the toilet facilities provided for ladies and little children who were with their mothers who were waiting in that room were the toilet facilities up the corridor marked "Ladies." (J. App. 77-78)

Dr. Kruger also testified that after the accident involving the infant plaintiff, he was within the area behind the door shown in plaintiff's Exhibit 4-A which has painted on it the words "Women Restroom;" that immediately inside that door when it is opened, as it is in plaintiff's Exhibit 4-A, there is a small foyer; that when that door is closed, the areas behind it and enclosed by it, consist of the foyer, the room in which the lockers are and the room in which the toilet facilities are; that in the room labeled waiting room, there are no toilet facilities. (J. App. 79)

Glendon H. Souviney was called as a witness for the appellant and testified that he was retired from the United States Army; that he was on ROTC duty at Georgetown University Dental School on June 15, 1951; that the ROTC Office was right across the hall from the ladies' locker room; that it was diagonally across, and he could look directly into the locker room from his office; that two children were racing up and down the hallway, yelling and chasing each other, and he heard somebody, a female voice, holler to the children to quiet down and sit still; that he went into his little reception room in the back of his office to have some coffee and relax; that it was quiet all of a sudden out in the hallway where the children were running around, and the next thing he heard was "this metal banging," and it sounded just like the steel wall lockers, metal against metal, and he heard the child scream; that the crash and the scream came about the same time, and he knew one of the lockers had fallen over; that he ran right out and could look in from his office at a diagonal direction, and he could see the locker on the floor; that he ran in and didn't know the child was under the locker; but when he got in, there was a lady who had lifted the locker part way off the boy, and he grabbed hold of it with his left hand and lifted it up and grabbed the boy by the feet and pulled him out; that it had hit right across the back of his skull, and he was bleeding and crying. (J. App. 79-82)

On cross-examination, Mr. Souviney testified that he had seen the lockers prior to January 15, 1951, and knew they were not fastened to the wall or floor, and it was enough for him merely to hear that noise to know that it was a locker that had fallen in that room, the sound came from there; that the lockers were fastened together in sections of three and were about six feet tall; that he remembers the word "ladies" over the door that had "Women Restroom" on it; that there was a door in that opening that closed both rooms and closed the areas which consisted of a small hall or foyer and the two rooms; that when the lockers fell, they fell toward the door; that two of the lockers were on the infant plaintiff; that the locker was lying down toward the

door, the top; that the infant plaintiff's feet were at an angle, and it looked as if he started to run as the lockers fell, and the top of the locker caught him as he was running, because his feet were at an angle and it looked as if he almost got clear when it hit him. (J. App. 82-85)

On cross-examination, Mr. Souviney further testified that when he heard children out in the corridor running up and down the hallway, he did not go out in the hallway and didn't see the children. (J. App. 85)

Bernard C. O'Leary was called as a witness by the appellant and testified that he is superintendent of the building at Georgetown Medical and Dental Schools, and was so employed on June 15, 1951; that he is familiar with the locker room in which the infant plaintiff was injured; that the lockers were put in the room in September, 1948; that the floor in the locker room is level, and the lockers were standing straight; that they had never had an accident with those lockers; that after this accident, he tested the tilt of the lockers and found that they had to tilt "that locker" thirteen and a half inches out at the top to throw it off of balance to fall down; that the lockers were not bolted to the walls prior to June 15, 1951; that the room in which the lockers stood was left open at all times; that the door can be locked by just pushing a push button; that the locker room was for the use of female students in the medical and dental school. (J. App. 88-91)

On cross-examination, Mr. O'Leary testified that the entrance shown in plaintiffs' Exhibit 4-A over which the word "ladies" appears is the entrance into the area where the room is in which the lockers were; that that entrance had a door on it which had painted on it "Women Restroom," so that when the door having "Women Restroom" painted on it was closed, the areas behind that door and within the enclosure made by the closing of that door, consisted of the little foyer, the room in which the lockers were and the room in which the toilet facilities were; that he was never in the locker room when the female medical

students were using the lockers so that he never had occasion to see whether or not the lockers would or would not tilt when they were being used; that the lockers were made of steel and were six feet, six inches tall, and a section of three of them weighed over one hundred to one hundred twenty-five pounds; that a three-locker section has four legs in the front and two in the back. The witness was shown plaintiffs' Exhibit 4-I showing the holes in the back legs against the wall. The witness admitted that the front feet had holes. The witness was shown plaintiffs' Exhibit 4-H and admitted that the lockers had angle irons at the top for the purpose of bolting the lockers to the wall. He was shown plaintiffs' Exhibit 4-I and 4-G and testified that neither the front nor the back legs were bolted to the floor and stated "I don't contend that the legs were bolted at any time." He also admitted that the lockers were not bolted at the top at the time they fell on the infant plaintiff, and testified that after the infant plaintiff was injured, they went into the room and bolted the lockers at the top. He said that he thought the pictures were taken after the lockers were bolted to the wall, but the pictures show that the lockers were not bolted to the wall at the time the pictures were taken. He testified that the floor was covered with linoleum which was put in when the building was built in 1929 or 1930, and he did not know whether there was any kind of seal between the linoleum and baseboard. (J. App. 91-97)

Mr. O'Leary further testified on cross-examination that after the infant plaintiff was injured, he went up and examined the three lockers that fell on him; that he examined them to see what contents were in any of the three lockers when they fell on the infant plaintiff and found they were all empty; that they were not in use at that time; that there were no female students there at that time; that they were out on their summer vacations, and the lockers were empty; that the room was empty and not in use at the time the infant plaintiff was injured; that even though the female students had gone, the door into the room where the lockers were had been not only left opened but also unlocked.

4. Facts Relating to the District Court's Alleged Refusal to Charge the Jury on the Question of Speculation as to Proximate Cause.

After the District Court's charge to the jury, which the appellant has not printed in the joint appendix, counsel for appellant said "It seems to me that there ought to be some instruction with reference to conjecture or speculation as to proximate cause." The appellant did not tender any prayer or request for an instruction covering "conjecture or speculation as to proximate cause." (J. App. 114)

In the charge to the jury, the District Court had said:

> "In that connection you should weigh the evidence presented here in open court without bias, prejudice or sympathy toward one side or the other. In determining the issues of fact submitted to you for decision you will consider and weigh the testimony of all the witnesses who have testified at this trial and take into account as well all the circumstances concerning which the testimony has been given.
>
> "The burden of proof is on the plaintiffs to establish every aspect of their cases, respectively, by what we call a fair preponderance of the evidence. The term 'preponderance of evidence' means such evidence as when weighed with that opposed to it has more convincing force. A party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes you, the jury, to believe that on that issue the probability of truth favors that party." (TR. 460)
>
> "***The burden of proof is upon the plaintiffs to prove by a fair preponderance of the evidence that the defendant was guilty of negligence and that such negligence was the proximate cause of the accident and of any damages which you may find that the plaintiff has sustained.
>
> "By the term 'proximate cause' which has just been used, is meant the primary or moving cause or fault where no other and independent cause disconnected therewith

> and self-operating intervenes to produce the result. The proximate cause of a result is that cause which in natural and continuous sequence unaccompanied by any efficient, intervening cause produces the result and without which the result would not have occurred." (TR. 464)

5. Facts Relating to the Infant Plaintiff's Appearance During Cross-Examination of a Witness for Appellant

In the course of impaneling the jury, the jurors saw the infant plaintiff. (J. App. 14)

The infant plaintiff was in court at the time of trial. (J. App. 72)

The appellant called J. Robert Brown as a witness, and he testified that the last time he saw the infant plaintiff was in his own house, and at that time the infant plaintiff did not have any observable scar on the back of his head. Thereupon, the infant plaintiff was exhibited to the witness and asked whether he knew him, and answered, "Yes, I recognize him." The infant plaintiff was then placed in a position where the back of his head could be seen by the witness and the jurors, and the witness was asked whether the infant plaintiff had "this scar on the back of his head" when the witness saw him the last time. The witness answered that "He could have had, sir." And when he was asked the question again, the witness said, "I don't know, sir." And then he said, "The last time Mr. Healy visited us this is not the boy who came with Mr. Healy." The witness then admitted that he did not see the infant plaintiff on the occasion that he said the infant plaintiff did not have any observable scar; he said, "I thought it was Tommy. That was not Tommy." (J. App. 73-74)

6. Facts Relating to the Testimony of Mrs. Healy as a Rebuttal Witness

Mrs. Healy was the appellees' first witness in the presentation of their case in chief. Her testimony in chief had covered the facts of the accident and the infant plaintiff's injuries. (J. App. 31-63)

The appellant called Dr. Frederic G. Burke as a witness, and he testified, among other things, that Mrs. Healy told him that the infant plaintiff "had always been clumsy, hyperactive, and was always getting into trouble, as far as several -- referring to several accidents and instances that had occurred with this youngster all his life." (J. App. 74-75)

The appellees recalled Mrs. Healy to rebut the above-mentioned testimony of Dr. Burke and the testimony of the appellants' witness Glendon H. Souviney which inferred that her children were running up and down the corridor. Counsel for the appellant objected on the ground that Mrs. Healy had been sitting in the courtroom. Counsel for the appellees informed the District Court concerning the two subjects about which Mrs. Healy would testify as a rebuttal witness and pointed to the fact that no other witness for the appellees had testified about those two subjects. (J. App. 102-103)

The District Court permitted Mrs. Healy to be recalled, and she testified that on the occasion involved she did not permit either of her children to run up and down the corridor or hallway; that there were certainly eight or ten other children on the first floor of the dental clinic where they first went, and when they were sent upstairs to the Oral Surgery Department, there were other children, at least two, maybe more, in the waiting room at the time she was there, in addition to her two children; that there was another child with an adult in the foyer leading to the room having the toilet facilities, and she would estimate that there were five or six children on the second floor, including her two children, and there were more than that on the first floor. (J. App. 103-104)

Mrs. Healy testified that she was in Dr. Burke's office when he examined the infant plaintiff on March 29, 1955; that she did not tell Dr. Burke that the infant plaintiff had always been clumsy; that she definitely told Dr. Burke that Tommy was very noticeably clumsy;

that he was noticeably different from her other children, and that she had observed it since his injury, and that he seemed to be subject to many mishaps following his injury; that she did not tell Dr. Burke that Tommy had been accident-prone all his life because Tommy was not accident-prone all his life, any more than any average three-year-old child falls or stumbles when learning to walk or playing. (J. App. 104-105)

No other witness for the appellees testified concerning the subjects of Mrs. Healy's rebuttal testimony either before or after Mrs. Healy testified as a rebuttal witness.

SUMMARY OF ARGUMENT

1-2. An order directing a plaintiff to deposit security for costs is not a final order. Therefore, Rule 60 (b) of the Federal Rules of Civil Procedure is inapplicable to a motion for leave for late filing of security for costs and is inapplicable to a motion to dismiss on the ground of late filing of security for costs. Rule 6 (b) is applicable. It contains no time limitation on the exercise of the Court's power under the rule. Consequently, the District Court had power to extend the time for filing security for costs more than one year after the time fixed in the original order had expired.

The Court did not abuse its discretion in its rulings which permitted late filing of security for costs by the appellee and which refused dismissal of the action on account of late filing of security for costs by the appellees. The non-filing of security for costs within the time fixed by the original order was the result of excusable neglect.

Appellant was not prejudiced or deprived of a fair and impartial trial by the District Court's rulings concerning late filing of security for costs by the appellees.

3. Appellees' opening statement to the jury and appellees' evidence made out a prima facie case.

Appellant's motions for a directed verdict at the close of the appellees' opening statement to the jury and at the close of the appellees' evidence were waived by appellant when it offered its evidence. While appellant renewed the motion at the close of all the evidence, appellant does not contend on this appeal that the District Court erred in denying its motion at that stage of the case. The evidence introduced by the appellant corroborated and supplemented the appellees' evidence and made a stronger case at the close of all the evidence, so that the appellant's motion for a directed verdict at the close of all the evidence did not present the same question made by its motions at the close of the appellees' opening statement to the jury and at the close of the appellees' evidence.

Substantial uncontradicted evidence showed that the appellant created and maintained a dangerous condition in the room in which the lockers stood, and that the danger was not an apparent danger but was a hidden danger.

Appellant's contention that the evidence did not show how the accident occurred ignores the reasonable inferences which the evidence created. "There is no evidence that there was anyone in the room but the child.***" (J. App. 111)

The infant appellee was an invitee at the time and place of his injuries and therefore the appellant owed to him the duty of ordinary care. Even if he was a mere licensee, he was entitled to be warned of the hidden danger. Even if he was a trespasser, he was entitled to recover if the appellant created and maintained an attractive nuisance. As a matter of law, a three and one-half-year-old child cannot be a trespasser. Regardless of the status of the three and one-half-year-old infant appellee at the time and place of his injury, appellant is liable because the infant plaintiff was too young as a matter of law to be capable of contributory negligence, and appellant

did not exercise the degree of care reasonably required in a place which appellant knew was frequented by children of tender years and incapable of exercising care for their own safety.

4. The District Court properly instructed the jury on proximate cause. Appellant's request for a further instruction on proximate cause was too general to form the basis for an assignment of error on appeal, was not in writing, was not timely in that it was not made at the close of the evidence or at an earlier time as required by Rule 51 of the Federal Rules of Civil Procedure, was not in proper form, and did not contain the substance of what the appellant wished to have the Court further instruct the jury.

5. The infant appellee was identified when the jury was impaneled, was in court during the trial, and was identified by the appellant's witness Brown. Exhibition of the infant appellee and the scar on the back of his head to the witness resulted in a retraction by the witness of his testimony that he had seen the infant appellee on a previous occasion and that he then had no observable scar on the back of his head.

The appellant has not shown, or attempted to show, any prejudice resulting from this incident of the trial, which actually served to produce the truth.

6. The District Court did not abuse its discretion in permitting Mrs. Healy to testify as a rebuttal witness on the two subjects of her rebuttal testimony. She was the appellees' only rebuttal witness, and the only witness who testified for the appellees on the two subjects of her rebuttal testimony.

The appellant has not shown any prejudice.

ARGUMENT

1-2. The District Court Did Not Exceed its Power or Abuse its Discretion in Permitting Late Filing of Security for Costs or in Refusing to Dismiss the Action on Account of Late Filing of Security for Costs.

Appellant asserts but does not attempt to show how it was prejudiced or how it was deprived of a fair and impartial trial by the District Court's rulings which permitted late filing of security for costs by the appellees, and which refused dismissal of the action on account of late filing of security for costs by the appellees. These rulings in no way related to the merits of the case or the trial of the case, so there is no perceivable basis for the appellant's assertion that as a result of these rulings, it was deprived of a fair and impartial trial. Nor is there any perceivable basis for the appellant's assertion that these rulings resulted in prejudice to the appellant. The verdict and judgment are in favor of the appellees, so that the appellees' bond for costs and the time it was filed have not in any manner affected the appellant's rights.

Appellant also contends that the District Court exceeded its power in permitting late filing of security for costs by the appellees. The basis of that contention is the appellant's contention that Rule 60 (b) of the Federal Rules of Civil Procedure is applicable. The appellant is mistaken in that contention. That Rule is inapplicable because it applies only to final judgments and orders. An order requiring the filing of security for costs is not a final order.

Rule 60 (b) reads as follows: "***On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:***"

A reading of the "Notes of Advisory Committee on Rules," 28 USCA 311-313 will remove any doubt that Rule 60 (b) applies only to

final judgments, orders, and proceedings. For example, it is stated on page 312 that:

> "If these various amendments, including principally those of Rule 60 (b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice.***"

Indemnity Ins. Co. of North America v. Reisley, 153 F. 2d 296, certiorari denied 66 S. Ct. 1349, 328 U.S. 857, 90 L.Ed. 1629, is a case where there was an appeal by the creditor of a bankrupt and the trustee, from an order of the referee in bankruptcy in which the referee refused to reconsider an order entered three years earlier. On the first hearing, the court reversed the decision against the trustee on the basis of the Bankruptcy Act. On re-hearing, they found the Bankruptcy Act inapplicable but went on to say at page 299, that:

> "***Nevertheless, Rule 60 (b), 28 U.S.C.A. following section 723c, is not applicable because it relates only to a final order;[1] and no order in a bankruptcy proceeding is final (in the sense that it cannot be reopened) until the proceeding has been terminated.***"

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[1] "American United Life Ins. Co. v. Haines City, Florida, 5 Cir., 117 F. 2d 574, 575. See Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 47, 63 S. Ct. 1393, 87 L.Ed. 1731, decided after the Rules became effective."

The order directing the appellees to deposit security for costs was not a final order. It did not make any final disposition of the case. We have not found any decision on the precise point. Obviously, it is not a final order because it does not make any final disposition of the case.

In Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 47, 63 S. Ct. 1393, 87 L.Ed. 1731, the Court said at page 47:

> "Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable,*** as are interlocutory orders of

> district courts in suits to enjoin infringement, *** the decision was not final until the conclusion of the accounting. *** Hence the Court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. Perkins v. Fourniquet, 6 How. 206, 208; McGourkey v. Toledo & Onio Central Ry. Co., 146 U.S. 536, 544; Simmons Co. v. Grier Bros. Co., supra, 90-91. It was free in its discretion to grant a re-argument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for the evidence."

In Parr v. United States, 351 U.S. 513, 100 L. Ed. 1377, 76 S. Ct. 912, the Court said:

> "***The considerations underlying the historic requirement of 'finality' in federal appellate procedure require no elaboration at this late date. See Cobbledick v. United States, 309 U.S. 323, 84 L. Ed. 783, 60 S Ct. 540. In general, a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.' St. Louis, I.M. & S.R. Co. v. Southern Express Co. 108 US 24, 28, 27 L. ed. 638, 639, 2 S Ct 6. This rule applies in criminal as well as civil cases. Berman v. United States, 302 US 211, 212, 213, 82 L ed. 204, 205, 58 S Ct. 164."

The appellant could have filed a motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the appellees had failed to comply with the order. The appellant could have filed such a motion under that rule on or after September 19, 1954, but the appellant did not choose to do so until after the appellees had filed their motion on May 10, 1956, for leave for late filing of security for costs, and after the appellees had, through the adult appellee, executed and filed a bond for security for costs in the amount fixed by the order of September 8, 1954.

If the appellant had timely filed a motion under Rule 41 (b) to dismiss the action for failure by the appellees to comply with the order directing them to file security for costs, and if the Court had entered an order dismissing the action on that ground, the latter order would have been a final order, and Rule 60 (b) would have been applicable. That is not what occurred in the case at bar. That is what occurred in Carpenter v. Carpenter, 81 U.S. App. D.C. 214, 156 F. 2d 857, cited in the appellant's brief. Obviously, that case is not in point. There the plaintiff failed to deposit security for costs after the defendant had moved to dismiss the action on account of the plaintiff's failure to comply with the order directing the deposit of security for costs and after the Court had informally granted one extension of time. Even after the Court dismissed the action, and after the plaintiff filed a motion for reconsideration of the order of dismissal, the plaintiff did not tender a bond for security for costs.

An order for security for costs not being a final order, Rule 6 (b) of the Federal Rules of Civil Procedure is applicable. That rule applies to orders other than final orders, and there is in that rule no limit on the time within which the Court can grant relief on the ground of excusable neglect, with only the exceptions stated in Rule 6 (b).

The "Notes of Advisory Committee on Rules" states, among other things, that:

> "***Rule 6 (b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired. ***It should also be noted that rule 6 (b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6 (b)."
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>
> "***Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in the rule 6 (b), ***"

We respectfully submit that the District Court did not abuse its discretion in finding excusable neglect from the facts and circumstances shown in the appellees' motion for leave for late filing of security for costs.

The appellant has not filed in this Court nor has it printed in the joint appendix the affidavit of former co-counsel for the appellees filed in support of the appellees' motion for leave to file security for costs after the time fixed in the order directing the filing of the same had expired. Therefore, the appellant has not shown or attempted to show any abuse of discretion on the part of the District Court. Neither has the appellant printed in the joint appendix the notice which accompanied the appellees' motion for leave for late filing of security for costs, and, therefore, the appellant likewise has failed to demonstrate, or attempt to demonstrate, that the appellant had no notice of the motion and order of the District Court which granted the appellees leave for late filing of security for costs. Neither has the appellant shown, or attempted to show, that the appellees did not file security for costs in accordance with leave granted by the Court. The record shows that security for costs was filed in accordance with that order. (J. App. 27 and 30)

3. The District Court Did Not Err in Denying Appellant's Motion for a Directed Verdict at the Close of Appellees' Opening Statement to the Jury or in Denying the Motion at the Close of the Appellees' Evidence

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It should be observed that the appellant does not contend that the District Court erred in denying the appellant's motion for a directed verdict at the close of all the evidence. The appellant's only contentions are that the Court erred in denying similar motions at the close of the appellees' opening statement to the jury and at the close of the appellees' evidence. There is reason in the record for this choice of points by

the appellant to rely upon in this appeal. The reason is that the evidence introduced by the appellant corroborated and supplemented the appellees' evidence that the appellant created and maintained (a) a dangerous condition in the room in which the lockers stood, (b) that the dangerous condition was not an apparent danger but was a hidden danger, and (c) that the danger, in addition to being a hidden danger as to all persons, adults as well as children, constituted an attractive nuisance because it was open, unguarded and attractive to children, who were invited by the appellant to its clinic and who were known by the appellant to frequent its clinic, including the areas within the enclosure made by the door and entrance labeled "Women Restroom" and "Ladies."

We think there never was any genuine question concerning whether the appellees' opening statement to the jury and evidence made out a prima facie case. But, if there was, the question was removed from the case when the appellant offered its evidence after its motions for a directed verdict at the close of the appellees' opening statement to the jury and at the close of the appellees' evidence had been denied.

In Blake v. Trainer, 79 App. D.C. 360, 148 F. 2d 10, the court said at page 363:

> "In the present case appellant's first point is that the court should have directed a verdict at the conclusion of the plaintiff's case.[2] ***"

[2] After a motion for a directed verdict at the close of plaintiff's case was overruled, defendant went forward and presented his defense. Having proceeded to put on his defense, defendant thereby waived his objection to the ruling denying his motion for a directed verdict at the close of plaintiff's case."

In George D. Horning v. McAleenan, 149 F. 2d 561 (4 Cir., 1945), cert. den. 66 S. Ct. 142, 326 U.S. 761, 90 L. Ed. 458, the court said at page 565:

> "***The introduction of evidence by the defendant after denial of a motion for a directed verdict at the close of plaintiffs' case was a waiver of that motion, Union Pac. Ry. v. Calaghan, 161 U.S. 91, 16 S. Ct. 493, 40 L. Ed. 628; Accident Ins. Co. v. Crandal, 120 U.S. 527, 7 S.Ct. 685, 30 L.Ed. 740; Detroit United Ry. Co. v. Nichols, 6 Cir., 165 F. 289 ***."

In Ruud v. American Packing & Provision Co., 177 F. 2d 538, 542, 543, the court said:

> "At the close of plaintiff's case defendant moved to dismiss the action and it is here urged that the denial of this motion was error. The motion was denied and defendant then produced testimony in support of his defense. The motion was not renewed at the close of all the evidence. This was a waiver of the motion, but in view of what we have already said with reference to the sufficiency of the evidence the motion was properly denied."

To the same effect as the above cases is Capital Transportation Co. v. Compton, 187 F. 2d 844.

In Home Ins. Co. of New York v. Davila, 212 F. 2d 731, the court said at page 733:

> "At the close of the plaintiff's evidence, the defendants moved for a directed verdict, on the ground that the plaintiff had produced no evidence of such fraud and deceit on the part of the representative of the insurers as would invalidate the settlements and releases. This motion the District Court denied; whereupon the defendants proceeded at some length to put in evidence bearing on the issues raised by both the special defenses contained in the answer. It is well-settled that if a motion under Rule 50 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., asking for a directed verdict at the close of the plaintiff's case is denied, and the defendant thereupon presents his own evidence, this constitutes a waiver of the motion; unless a renewed motion for a directed verdict is made at the close of all the evidence, the defendant is precluded from questioning on appeal the sufficiency of the evidence to take the case to the jury. Minnehaha County v. Kelley, 8 Cir., 1945, 150 F. 2d 356, 359; Ruud v. American Packing & Provision Co., 9 Cir., 1949, 177 F. 2d 538, 542. In the instant case, defendants made no motion for a directed verdict at the close of all the evidence, under Rule 50 (b); nor did they, after the jury had returned its verdict for the plaintiff, move for judgment notwithstanding the verdict. In the present posture of the case, even though we thought that the evidence was not sufficient to sustain the jury's verdict, we could not upon remand direct the District Court to vacate the judgment for the

> plaintiff and enter judgment for the defendants notwithstanding the verdict. See Cone v. West Virginia Pulp & Paper Co., 1947, 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849; Globe Liquor Co., Inc. v. San Roman, 1948, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177; Johnson v. New York, N. H. & H. R. Co., 1952, 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77.***"

There was substantial uncontradicted evidence introduced by the appellees from which the jury could find that the appellant created and maintained a dangerous condition in the locker room and that the dangerous condition was not an apparent danger but was a hidden danger. In fact, much of the appellant's evidence was to the same effect. The appellant's brief does not dispute those facts.

The appellant's argument is that the evidence did not show how the accident occurred. The trouble with the appellant's argument is that it ignores the reasonable inferences which the evidence created. The trial judge said: "There is no evidence that there was anyone in the room but the child.***" (J. App. 111)

In Smith v. Davis, 22 App. D.C. 298, 317, this Court said:

> "And so in the present case, the fact that the pile of timber did fall and inflict the injury that is complained of was proof to justify the inference that the pile of timber was liable to fall, and that there was a probability of the occurrence of such accidents as did in fact occur. Thus, by piling the lumber in the street and allowing it to remain there, the defendants must, as a consequence of their illegal acts, be held to have known to be possible, and therefore chargeable with,the injury resulting therefrom."

In Catholic University v. Waggaman, 32 App. D.C. 307, 320, this court said:

> "The courts of review in this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury. This court, in the case of Glaria v. Washington Southern R. Co., 30 App. D.C. 559, said: 'A motion to direct a verdict is an admission of every fact in evidence, and of

> every inference reasonably deducible therefrom. And the motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case.' The rule more generally followed is that 'it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the court.' These narrow restrictions apply where the court has before it the whole case. Even less latitude is allowed where the jury are peremptorily instructed at the conclusion of the plaintiff's affirmative case than where such an instruction is given when all the evidence of the parties is before the court."

In Best, Administrator, v. District of Columbia, 291 U.S. 411, 78 L. Ed. 882, 54 S. Ct. 487, Reversing (1933), 62 App. D.C. 271, 66 F. 2d 797, certiorari granted 54 S. Ct. 122, 290 U.S. 619, 78 L. Ed. 540, the District of Columbia was sued for the wrongful death of a child five years of age. While playing on a wharf belonging to the District of Columbia, the child fell through a hole in the wharf and was drowned. The District Court directed a verdict for the defendant at the close of the plaintiff's opening statement to the jury. This Court affirmed and the Supreme Court reversed this Court and the District Court, saying, page 415:

> "There is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff's counsel where that statement establishes that the plaintiff has no right to recover. *** But the power is not properly exercised if the opening statement leaves doubt as to the facts or permits conflicting inferences. Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & Danville R. Co. v. Powers, 149 U.S. 43, 45; Texas & Pacific Ry. Co. v. Harvey, 228 U.S. 319, 324; Gunning v. Cooley, 281 U.S. 90, 94. The opening statement of counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence.

> 'If a doubt exists,' said the Court in the Oscanyan case, supra, 'as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.' Plaintiff is entitled to the benefit of all inferences that may be drawn from his counsel's statement. To warrant the court in directing a verdict for defendant upon that statement, it is not enough that the statement be lacking in definiteness but it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists. See Illinois Power & Light Corp. v. Hurley, 49 F. (2d) 681, 684; Stuthman v. United States, 67 F. (2d) 521, 523."

See also Cioffi, a minor v. Queenstown Apartments, Case No. 13,355 in this Court, decided April 18, 1957.

In Bell v. Brown, 76 U.S. App. D.C. 5, 128 F. 2d 313, this court said:

> "The evidence in this case, as we read the record, preponderates strongly against appellant. Nevertheless, we are satisfied that there was enough to require that the case go to the jury; under the well-established rule that if there is evidence upon which, when construed most favorably to the person upon whom the onus of proof is imposed, reasonable and fair-minded men, properly instructed as to the law, could find a verdict in his favor, then the question is not one of law but of fact to be settled by the jury.[1] "

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[1] Gunning v. Cooley, 281 U.S. 90, 95, 50 S. Ct. 231, 74 L. Ed. 720; Jackson v. Capital Transit Co., 69 App. D.C. 147, 99 F. 2d 380, and cases there cited."

The cases on this point are too numerous to cite all of them.

The appellees' case is not grounded solely on the doctrine of attractive nuisance. That doctrine presupposes the infant involved was a trespasser except for the invitation arising from the attractive nuisance. We do not concede that the infant appellee was a trespasser at the time and place he was injured. Our position primarily is that he was an invitee to whom the appellant owed the duty of ordinary care. Secondarily,

we contend (a) that even if he was a mere licensee, he was entitled to be warned of a hidden danger and (b) that even if he was legally capable of being a trespasser at three and one-half years of age, and was in fact a trespasser, he was entitled to recover if the appellant created and maintained an attractive nuisance. Finally, we contend that regardless of his status at the time and place of his injury, the appellant is liable because a child too young as a matter of law to be capable of contributory negligence is involved and the appellant did not exercise the degree of care reasonably required in a place which the appellant knew was frequented by children of tender years and incapable of exercising care for their own safety.

The infant appellee, accompanying his mother to the appellant's clinic under the facts and circumstances shown by the appellees' uncontradicted evidence, was an invitee.

In Custer v. Atlantic & Pacific Tea Co., 43 A. 2d 716, the infant plaintiff, twenty months of age, accompanied her mother to the defendant's store, it being the mother's purpose to buy groceries there. The Municipal Court of Appeals said:

> "(1, 2) It should be said at once that this infant plaintiff enjoyed the status of an invitee to whom the defendant owed the duty of ordinary care, and not that of a mere licensee to whom it would have owed no duty except not willfully to do her harm. It was error to rule otherwise. We think it requires no elaborate reasoning to reach the conclusion that a 20-month old child accompanying its mother on a shopping mission has the same status as the mother. This case is totally unlike those based on the attractive nuisance doctrine. Compare Branan v. Wimsatt, 54 App. D.C. 374, 298 F. 833, where a boy 12 1/2 years old, playing in a lumber yard, was held to be a mere licensee. And note that in a later case the Court referred to that decision as having been reached 'largely because the child was 12 1/2 years old and fully conscious of the danger.' Eastburn v. Levin, 72 App. D.C. 190, 113 F. 2d 176, 177. Here the situation is quite different. Defendant, in maintaining a retail store impliedly invited the mother to come upon the premises.

> And by every consideration of custom and usage and common sense, such invitation extended to and included the mother's infant child. Grogan v. O'Keefe's, Inc., 267 Mass. 189, 166 N.E. 721; Wheaton v. Goldblatt Bros., 295 Ill. App. 618, 15 N.E. 2d 64; L.S. Ayres & Co. v. Hicks, Ind. Sup., 40 N.E. 2d 334; Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W. 2d 1073; Crane v. Smith, 23 Cal. 2d 288, 144 P. 2d 356; Walec v. Jersey State Electric Co., 125 N.J.L. 90, 13 A. 2d 301. See also Moohr v. Victoria Inv. Co., 144 Wash. 387, 258 P. 43."

See also Kalus v. Bass, 122 Md. 467, 89 Atl. 731, 39 Ann. Cases (1916A) 985.

There was evidence from which the jury reasonably could have found that the appellant's invitation extended to and included all the areas within the door and entrance labeled "Women Restroom" and "Ladies," and it must be presumed that the jury did so. It was a jury question. See Coberth v. Great Atlantic & Pacific Tea Co., 36 App. D.C. 569, 575, and Malolepszy v. Central Market, Inc., et al., 143 Neb. 356, 363, 9 N.W. (2d) 474, 478.

In Arthur v. Standard Engineering Co., 89 U.S. App. D.C. 399, 193 F. 2d 903, this Court said:

> "(1, 2) It is well settled that an invitor owes his invitee the duty of furnishing him with reasonably safe premises or appliances and will be held liable for injuries caused by a negligent failure to perform the duty. Schwartzman v. Lloyd, 1936, 65 App. D.C. 216, 82 F. 2d 822; Hellyer v. Sears Roebuck & Co., 1933, 62 App. D.C. 318, 67 F. 2d 584; Bell v. Central National Bank, 1907, 28 App. D.C. 580.***"

Even if the infant plaintiff was a mere licensee, the appellant would be liable to him because the dangerous condition that the appellant created and maintained and which caused the injury was a latent or hidden danger.

In Gleason v. Academy of the Holy Cross, 83 U.S. App. D.C. 253, 168 F. 2d 561, this Court said, at page 254:

> "(1, 2)*** We think it unimportant that appellant was a social rather than a business guest of appellee, or, in technical language, a gratuitous licensee rather than an invitee. Dangers that reasonably careful people are likely not to discover are latent or hidden. The step was such a danger. It is immaterial that the step was open to view in the sense that it might have been discovered by an extraordinarily prudent person. Appellee knew of the danger and made no effort to protect or warn appellant against it. Occupiers of premises have long been liable, even to gratuitous licensees, for injuries that result from this sort of negligence. 'If it could be found that (the step) was a danger which the careful visitor might not discover, and that the proprietor should have realized the fact, the court could not rule as matter of law either that there was no breach of duty by the proprietor, or that there was contributory negligence or an assumption of the risk by the visitor.' Recreation Centre Corporation v. Zimmerman, 172 Md. 309, 191 A. 233, 234."

Even if there had been no evidence from which a jury could have found that the invitation extended to and included all the areas within the door and entrance labeled "Women Restroom" and "Ladies" as to all invitees on the premises, nevertheless as to the infant appellee, who was too young to be capable of contributory negligence, there was evidence from which the jury could find that the invitation extended to and included the locker room, because there was substantial evidence that the defendant created and maintained an attractive nuisance in the locker room; that is to say, it created and maintained a dangerous condition in the locker room that was open, unguarded and attractive to children, and the appellant invited children to its clinic, knew they frequented the clinic and the areas within the enclosure made by the door and entrance labeled "Women Restroom" and "Ladies."

The District Court could not have ruled as a matter of law that the appellant's invitation did not extend to and include all the areas within

the door and entrance labeled as indicated above. It could not have so ruled even if the infant appellee had been an adult. The extent of the invitation was a question of fact, as hereinbefore shown.

Inasmuch as the infant appellee was an infant of tender years and incapable as a matter of law of contributory negligence, there was evidence of an additional reason in his case, which would have been absent in the case of an adult, for a finding that the invitation extended to and included the locker room; namely, the evidence that the appellant created and maintained an attractive nuisance in the room in which the lockers were. The evidence that the appellant did so precluded the District Court from treating the extent of the invitation as a non-jury question and from applying the rule of non-liability to trespassers except for wilful injury.

The evidence proved beyond reasonable doubt that the appellant knew of the dangerous condition. The appellant put the lockers in the room in September, 1948, and did not fasten them to the wall or the floor. The appellant knew that it created and maintained the lockers in that condition. (J. App. 89)

Certainly it is a reasonable inference that it was the lockers that attracted the infant appellee into the room in view of the evidence that he was out of his mother's presence only momentarily before the lockers fell and injured him.

In Best, Administrator, v. District of Columbia, supra, the Court said, page 416:

> "The controversy in this case largely turns upon a difference of view as to the inferences to be drawn from the opening statement. Thus, respondent argues that there was a failure to show that 'the wharf could be seen from the public space'; that 'the child was attracted by the presence of the wharf itself, or any article or thing which may have been upon the wharf'; that 'there was any latent or hidden danger at the place' where the child met his death; that 'there was ever a prior accident to children at or near this wharf'; that 'respondent

> invited or permitted petitioner's intestate or other children to enter or play on its wharf.' But with respect to each of these circumstances (with a single unimportant exception) the opening statement of counsel permitted an inference in petitioner's favor.***"

The Supreme Court then pointed to the various permissible inferences to be drawn from the plaintiff's opening statement to the jury, and cited and discussed some of its former decisions in similar cases, including United Zinc Co. v. Britt, 258 U.S. 268, where the Court said that while "temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult." The Court then referred to its statement in the Britt case that the principle if accepted should be very cautiously applied, and said, page 419:

> "***We think that the present case falls within that appropriate application. Were the case merely one of an accessible wharf, it could not be said that the District would be subject to liability from the fact, without more, that a child strayed there and fell from the wharf into the water. The duty must find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated, and becuase of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection.***"

In 38 Am. Jur. 798, it is stated:

> "Sec. 137. Injuries to Children. -- The proprietor of a store or shop who invites or induces children to come upon the premises must use care to keep the premises reasonably safe for the children. Account is taken, in determining the precautions necessary to be exercised, of childish impulses[18] as well as of the fact that certain dangerous conditions in the store or shop may attract small children to their injury.[19] ***"

18 Anno: 33 ALR 194, s. 43 ALR 866, 46 ALR 1112, 58 ALR 139, and 100 ALR 724.

19 See infra, Secs. 142 et. seq."

The above-cited annotations furnish substantial guidance in the case at bar. For example, Siddall v. Jansen, 168 Ill. 43, 39 LRA 112, 48 N.E. 191, which is cited in the Annotation in 33 ALR 194, it was held that whether a child five years of age is a trespasser or not when playing near an elevator in a store, used by employees, located a short distance from the main floor, and connected with it by open doors, is a question for the jury if the child was rightfully in the store by the invitation of the father, an employee in the store. Other cases which furnish guidance in the case at bar are Hydraulic Works Co. v. Orr, 83 Pa. State Reports 332, 335; Miller v. Geo. B. Peck Dry Goods Co., 104 Mo. App. 609, 78 S.W. 682; Belcher v. John M. Smyth Co., 243 Ill. App. 65; Grogan v. O'Keefe's, 267 Mass. 189, 166 N.E. 721.

The above-cited annotations are further supplemented in 162 ALR 949.

In 36 ALR 118, there is an Annotation covering the point that a child of such tender years as three and one-half cannot be regarded as a trespasser, not on the ground that he was impliedly invited to enter, but on the ground that his tender years preclude him from being regarded as a trespasser. This Annotation is supplemented in 39 ALR 486, 45 ALR 982, 53 ALR 1344 and 60 ALR 1444.

In 107 ALR 71, there is an Annotation covering the point that there is a conclusive presumption that a child of such tender years as three and one-half cannot be guilty of contributory negligence.

4. The District Court Did Not Err in Its Instructions to the Jury Concerning Proximate Cause.

The District Court properly instructed the jury that the appellees had to prove by a fair preponderance of the evidence that the appellant was guilty of negligence and that such negligence was the proximate cause of the accident and of any damages which the appellees sustained. The instruction properly defined the term "proximate cause."

Appellant's request for "some instruction with reference to conjecture or speculation as to proximate cause" was entirely too general to form the basis for an assignment of error on appeal. Moreover, Rule 51 of the Federal Rules of Civil Procedure provides that requests for instructions to the jury by any party should be filed in writing at the close of the evidence or at such earlier time during the trial as the Court reasonably directs. Consequently, the appellant's request was too late as well as too general and lacking in specificity. It was not in proper form and did not contain the substance of what the appellant wished to have the Court further instruct the jury.

In Cohen v. Evening Star Newspaper Co., 72 App. D.C. 258, 259, 113 F. 2d 523, the Court said:

> "A party has no vested interest in any particular form of instruction.[1] This is true, even though the proffered prayer may be unobjectionable in itself, standing alone, as a statement of the law.[2] What the language of the instructions shall be is for the trial judge to determine.[3] If, on examination of the entire charge, it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied.[4]"

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1 Ayers v. Watson, 137 U.S. 584, 601, 11 S. Ct. 201, 34 L.Ed. 803. See Gassenheimer v. United States, 26 App. D.C. 432, 446; Shettel v. United States, 72 App. D.C. 250, 113 F. 2d 34, decided June 10, 1940.

2 Redman v. Smith, 51 App. D.C. 131, 277 F. 533; Utah Power & Light Co. v. Woody, 10 Cir., 62 F. 2d 613.

3 Ayers v. Watson, 137 U.S. 584, 601, 11 S.Ct. 201, 34 L. Ed. 803; Washington Times Co. v. Murray, 55 App. D.C. 32, 34, 299 F. 903, 906.

4 McCartney v. Holmquist, 70 App. D.C. 334, 337, 106 F. 2d 855, 858, 126 A.L.R. 375; Redman v. Smith, 51 App. D.C. 31, 277 F. 533."

In Thomas v. United States, 74 App. D.C. 167, 172, 121 F. 2d 905, the Court said:

> "***It is axiomatic that it is not error to refuse requested instructions, even though they may be correct statements of the law, if the subject matter has been properly covered by the charge given.[37]"

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37 Clifton v. United States, 54 App. D.C. 104, 295 F. 925; Talbert v. United States, 42 App. D.C. 1, 14, certiorari denied, 234 U.S. 762, 34 S. Ct. 997, 58 L. Ed. 1581."

The Thomas case was cited with approval for the same point in Littman v. Williams, 79 App. D.C. 334, 335. To the same effect is Hodge v. United States, 126 F. 2d 849.

5. The District Court Did Not Err in Permitting the Appellees to Exhibit the Infant Appellee to a Witness for the Appellant Who Admittedly Testified Falsely and Retracted His Testimony When the Infant Appellee Was Exhibited to Him.

The facts of this matter, which appear in this brief in the Counter-Statement of the Case, are an answer to the appellant's contention.

The appellant's Witness Brown testified falsely to a fact which could be, and was, demonstrated to be false by exhibiting the infant appellee and the scar on the back of his head to the witness. When that was done, the witness retracted his testimony. The infant appellee had already been sufficiently identified as the infant plaintiff when the jury was impaneled and by his presence during the trial. If that was not sufficient identification, the witness Brown identified him sufficiently and said he was not the child to whom he referred in his prior testimony; that he thought that child was Tommy but was not Tommy.

This incident of the trial produced the truth, the objective of examination of witnesses.

The appellant does not show or even attempt to show any prejudice.

6. The District Court Did Not Err in Permitting Mrs. Healy to Testify as a Rebuttal Witness.

Mrs. Healy was the appellees' only rebuttal witness and the only witness who testified for the appellees on the two subjects of her rebuttal testimony. (J. App. 103-107)

Jones on Evidence, Civil Cases, Third Edition, Section 807, page 1257, states:

"Sec. 807. Exclusion of Witnesses from Courtroom. --***The object of such an order is obviously to elicit the truth by securing testimony not influenced by the statements of other witnesses or the suggestions of counsel, as well as to prevent collusion and concert of testimony among witnesses.***"

"Sec. 808. Violation of Order Excluding Witnesses--Effect. --By the early practice, if a witness remained in the courtroom in violation of the order, he was not allowed to testify.[25] Later it was held to be a matter of judicial discretion, whether his testimony should be received.[26] But in England, except in revenue cases, it is now held that the judge has no right to reject the witness on this ground;[27] and in this country, the decided weight of authority tends toward the view that, where the party is without fault, and the witness disobeys the order for exclusion, the party ought not to be deprived of the testimony of his witness.[28] Still there is good authority for the view that the testimony may be received or rejected in the discretion of the court.[29]

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25 Greenl. Ev., Sec. 432. See also, Chandler v. Home, 2 Moody & Rob. 423.

26 Hey v. Commonwealth, 32 Gratt. (Va.) 946, 34 Am. Rep. 799; Cobbett v. Hudson, 1 El. & B. 11, 22 L.J. (Q.B.) 13.

27 Chandler v. Home, 2 Moody & Rob. 423; Cook v. Nethercote, 6 Car. & P. 743; Cobbett v. Hudson, 22 L.J. (Q.B.) 13, 1 El. & B. 11.

28 Holder v. United States, 150 U.S. 91, 37 L. Ed. 1010, 14 Sup. Ct. 10; Pleasant v. State, 15 Ark. 624; People v. Boscovitch, 20 Cal. 436; Lassiter v. State, 67 Ga. 739; State v. Thomas, 111 Ind. 575, 13 N.E. 35; Taylor v. State, 130 Ind. 66, 29 N.E. 415; Grimes v. Martin, 10 Iowa, 347; State v. Kissock, 111 Iowa, 690, 83 N.W. 724; State v. Falk, 46 Kan. 498, 26 Pac. 1023; Parker v. Commonwealth (Ky.), 51 S.W. 573; State v. Ducote, 47 La. Ann. 46, 16 So. 562; Illinois C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873; State v. Salge, 2 Nev. 321; Hubbard v. Hubbard, 7 Or. 42; Smith v. State, 4 Lea (Tenn.), 428; Pile v. State, 107 Tenn. 532, 64 S.W. 477; Hey v. Commonwealth, 32 Gratt. (Va.), 946, 34 Am. Rep. 799; Commonwealth v. Brown, 90 Va. 671, 19 S.E. 447; State v. Lee Doon, 7 Wash. 308, 34 Pac. 1103; Gregg v. State, 13 W. Va. 705.

29 Holder v. United States, 150 U.S. 91, 37 L. Ed. 1010, 14 Sup. Ct. 10; Thorn v. Kemp, 98 Ala. 417, 13 So. 749; Hall v. State, 137 Ala. 44, 34 So. 680; Pergason v. Etcherson, 91 Ga. 785, 18 S.E. 29; Staver & Abbott Co. v. Coe, 49 Ill. App. 426; Gilbert v. Commonwealth, 111 Ky. 793, 64 S.W. 846; State v. Jones, 47 La. Ann. 1524, 18 So. 515; Taylor v. State (Miss.), 30 So. 657; Dyer v. Morris, 4 Mo. 214; State v. Gesell, 124 Mo. 531, 27 S.W. 1101; Pumell v. Pumell, 89 N.C. 42; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444. See also cases last cited."

The record shows that Mrs. Healy was called as a rebuttal witness immediately upon the close of the appellant's evidence and without any contact with counsel for the appellants between the time of the taking of the testimony that she was called to rebut and her rebuttal testimony. (J. App. 102) Consequently, Mrs. Healy did not even know what subjects she was going to be examined upon in her rebuttal testimony. The subjects of her rebuttal testimony were chosen by counsel for the appellees. The suggestion "that had Mrs. Healy been excluded during the testimony of Dr. Burke she would not have been in a position to take issue with his testimony in the manner that she did" assumes without any basis for the assumption that Mrs. Healy chose the subjects of her rebuttal testimony. Her testimony did not consist of volunteered statements from her. Her testimony resulted from appropriate questions put to her by counsel for the appellees.

There is no support in the record for the appellant's contention that it "was seriously prejudiced by this procedure."

CONCLUSION

It is respectfully submitted that the verdicts and judgments should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,682

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE,
a Corporation

Appellant,

v.

THOMAS PATRICK HEALY,
an infant, by and through
his father and next friend,
James D. Healy, and
JAMES D. HEALY

Appellees.

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 10 1957
Joseph W. Stewart
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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1. THE APPELLEE HAS FAILED TO SHOW WHERE IN THE RECORD THERE IS ANY EVIDENCE OF THE ELEMENTS OF PROOF NECESSARY TO HOLD THE DEFENDANTS LIABLE

The only evidence of the incident giving rise to the claim in this case is that which establishes that a child left the care and custody of the mother and went into a locker room which was adjacent to the ladies' restroom and which was for the use of female students at the hospital and that a section of the lockers fell upon the child. There is absolutely no other evidence concerning the incident. The appellee has

maintained that the lockers should have been bolted to the floor and wall but the superintendent of the building testified that they were not intended to be so bolted and that the lockers had been in that place for the past three (3) years without any incident. This does not establish negligence or knowledge upon the part of the appellant.

It is admitted that the locker room was a separate room adjacent to the ladies' restroom. Certainly Mrs. Healy had no business in that room and neither did the child. It is incredible that the appellee should attempt to have this court believe that this room, the locker room where the accident occurred, "was frequented by children of tender years". There is absolutely no evidence in the record to sustain such a comment and the appellee has not cited this court to any such testimony. What is even worse is the comment by the appellee that the "Appellant knew" that the locker room was frequented by such children. Again there is no such evidence in the record and appellees do not cite the source for such a statement.

Throughout the brief appellee makes comments to the effect that there is substantial and contradicted evidence showing that the appellant created and maintained a dangerous condition in the locker room and that the danger was not an apparent danger but was a hidden danger (p. 17). He states further that the evidence introduced by the appellant corroborated and supplemented appellees' evidence that the appellant created and maintained a dangerous condition in the locker room and that the dangerous condition was not apparent but was hidden and that the danger extended to all persons as well as children and that the lockers constituted an attractive nuisance because the door was open, unguarded and attractive to children (p. 24). It is respectfully submitted that there is not one word of testimony in this record that would prove such allegations and the appellee has not referred to any portion of the record which would sustain such allegations. At no time during the taking of testimony were there words regarding a dangerous condition, hidden or apparent danger, or attractive nuisance ever used

or implied. As previously stated, the record simply shows that an accident happened. The mere fact that the appellant owned the premises does not ipso facto say that the appellant created and maintained a dangerous condition and the mere fact that the door to the locker room was open does not make the lockers an attractive nuisance. There is not one word of testimony in this record to show that the appellants were negligent in any way or that they knew of any hidden danger, whatever it might have been, certainly the record does not disclose it, or that the appellant failed to use ordinary care.

2. THE APPELLEE ERRONEOUSLY CONTENDS THAT THE APPELLANT CONCEDES THAT THEY MET THE NECESSARY ELEMENTS OF PROOF AT THE CONCLUSION OF THE TRIAL AND THAT APPELLANTS' STATEMENT OF POINTS DID NOT INCLUDE THE MOTION FOR A DIRECTED VERDICT AT THE CONCLUSION OF THE TRIAL.

The appellant made a motion for a directed verdict at the conclusion of appellees' opening statement (R. 15), again at the conclusion of plaintiff's case (R. 209 and 399). Actually the plaintiff's witness was the last witness on the stand and the motion at p. 399 was made at the conclusion of plaintiff's testimony and, therefore, at the conclusion of plaintiff's case and as such the two motions merged into one. There has never been any concession by the appellant that the appellee ever made out a case against the appellant and it seems rather clear that the essential elements of proof have not been met. So far as proving the necessary elements against the defendant they were not stated in the opening statement nor were they ever established during the course of the trial. In other words, the situation was the same at the making of the motion for a directed verdict at p. 399 as it was on the two prior occasions on p. 209 and on p. 15. All we have by way of proof is the simple fact that an accident happened on appellant's property, a child was injured, and that is all. There is no evidence of negligence upon the part of the appellant, and there is no evidence that the lockers

were alluring or that the appellant had knowledge of the alluring or inherent dangerous quality of the lockers or that the appellants breached any legal duty. Neither was there any evidence of the reason why the child left the care and custody of his mother and went into the locker room, the nature and kind of attraction, if there was such a thing, or even the proximate cause of the injury.

3. APPELLEE ERRONEOUSLY STATES THAT APPELLANT WAS AFFORDED A HEARING ON THE MOTION FILED BY APPELLEE SEEKING AUTHORITY FOR LATE COMPLIANCE WITH A COURT ORDER.

It is difficult to understand how the appellee could arrive at such a conclusion when the appellee knows that the first trial judge suggested that both parties file motions and that it was understood under the rules that these motions could be filed only after getting permission of the pre-trial judge. The appellee knows that instead of simply filing the motion he presented an order to the pre-trial judge granting the motion all out of the presence of the appellant, appellee knowing that appellant was engaged in another court. Appellee also knows that a copy of this order was not submitted to appellant for a long time thereafter and that in due time appellant filed an opposition to appellee's motion and even then appellee did not advise appellant that the court had signed such an order granting the motion for which opposition was timely filed. Appellant respectfully submits that under these circumstances the appellant was not afforded a hearing upon this motion and never has had a hearing on this motion.

4. APPELLEE HAS FAILED TO MEET THE PROPOSITION THAT UNDER THE CIRCUMSTANCES IT WAS THE RESPONSIBILITY OF THE MOTHER TO TAKE CARE OF HER CHILD AND THIS RESPONSIBILITY CANNOT BE TRANSFERRED TO APPELLANT.

As indicated in the appellant's brief, (p. 15-16), the law in this jurisdiction as enunciated by this court in the case of Branan vs. Winsatt, 54 App. D. C. 374, 298 Fed. 833, is to the effect that "The

duty devolves on the natural guardian and lawful custodian to protect children from the consciences of their restless spirit of adventure and that duty cannot justly be wholly transferred to strangers who are under no obligation to keep watch and ward over the children of others" (see also Tomlison v. Vicksburg R. Co. 143 La. 641, 643; 79 So. 174 and Sullivan v. Huedekoper, 27 App. D.C. 154, 5 ALR (NS) 263, 7 Ann. Cas. 196.

Accordingly, it is well established that it is the primary duty of the parents to guard and protect a child against dangers and this duty cannot be shifted to the owner of property. In this case the appellee makes a great point of the fact that the child was young and as such he was too young to even be a trespasser, yet they admit that the child was at the time and place in the care and custody of his mother. Obviously, she negligently permitted her child to get away from her control and the child was injured. It is respectfully submitted that the responsibility was with the mother rather than the appellant and that the resulting injuries were the result of negligence of the mother in failing to maintain care and control over her child and that there is no responsibility on the part of appellant.

CONCLUSION

For the foregoing reasons and the reasons set forth in the appellant's main brief it is respectfully urged that the judgment of the Lower Court be reversed and the proceedings dismissed.

Respectfully submitted,

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